MIAMIBEACH
**City of Miami Beach,** 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

# COMMITTEE MEMORANDUM

TO: Commissioner Matti Bower, Chairperson
Commissioner Luis R. Garcia, Jr., Chairperson
**Members of the Ad Hoc Condominium Reform Taskforce**
VACANT – Appointed by Commissioner Matti Bower
Nina Baliga – Appointed by Commissioner Luis R. Garcia, Jr.
VACANT – Appointed by Commissioner Richard Steinberg
Joe Fontana – Appointed by Commissioner Saul Gross
Michael C. Gongora – Appointed by Commissioner Richard Steinberg
Calvin Kohli – Appointed by Commissioner Saul Gross
Luis Maseda – Appointed by Commissioner Jerry Libbin
Milli Membiela – Appointed by Commissioner Simon Cruz
Barbara Montero – Appointed by Commissioner Jerry Libbin
Maria Elena Negrin – Appointed by Commissioner Luis R. Garcia, Jr.
Rocio Sullivan – Appointed by Commissioner Simon Cruz
Stevan M. Zaiman – Appointed by Commissioner Matti Bower
Morris Sunshine- Appointed by Mayor David Dermer
Justo Gomez- Appointed by Mayor David Dermer

FROM: Jorge M. Gonzalez, City Manager

DATE: July 10, 2006

SUBJECT: **Meeting of the Ad Hoc Condominium Reform Taskforce**

A meeting of the Ad Hoc Condominium Reform Taskforce has been scheduled for Monday July 10, 2006 at 6:00PM in the City Manager's Large Conference Room, fourth floor of City Hall.

## AGENDA

1. **Minutes of the June 20, 2006 Ad Hoc Condo Reform Taskforce**
2. **Discuss all adopted Motions by the Taskforce and determine how to move each item forward. ITEM DEFERRED FROM JUNE 20, 2006 MEETING.**
3. **Staff analysis of options available in providing city lien information in a centralized, accessible area. ITEM DEFERRED FROM JUNE 20, 2006 MEETING.**
4. **Discuss Condominium Related Bills from the 2006 State Legislative Session. ITEM DEFERRED FROM JUNE 20, 2006 MEETING.**

# Minutes of the June 20, 2006
# Ad Hoc Condo Reform Taskforce

ITEM 1

ITEM ONE

# MIAMIBEACH

**City of Miami Beach,** 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

## MEMORANDUM

TO: Mayor David Dermer and Members of the City Commission

FROM: Jorge M. Gonzalez, City Manager

DATE: July 10, 2006

SUBJECT: **MINUTES OF THE AD HOC CONDOMINIUM REFORM TASKFORCE MEETING OF JUNE 20, 2006**

The meeting of the Adhoc Condominium Reform Taskforce was held on Tuesday, June 20, 2006. **The attendees were as follows:** Commissioner Luis R. Garcia, Jr., Nina Baliga, Joe Fontana, Justo Gomez, Michael C. Gongora, Calvin Kohli, Milli Membiela Barbara Montero, Rocio Sullivan, Morris Sunshine and Stevan M. Zaiman.

**Absent:** Commissioner Matti Bower, Luis Maseda and Maria Elena Negrin.

**City Staff:** Tim Hemstreet, Assistant City Manager; Steven Rothstein, Senior Assistant City Attorney; Rhonda Hasan, First Assistant City Attorney; Georgina Echert, Assistant Finance Director; Andres Villareal, Chief Building Code Compliance Inspector and Dolores M. Mejia, Special Projects Administrator.

## AGENDA

1. **Minutes of the May 30, 2006 Ad Hoc Condo Reform Taskforce**

   MOTION: Approval of the minutes, with amendment (reflect Morris Sunshine as opposing the extension of the Taskforce for 6 months).

   VOTE: Unanimously approved.

2. **Discuss all adopted Motions by the Taskforce and determine how to move each item forward.**

   MOTION: Defer discussion of items 2-4 until the July 10th Ad Hoc Condominium Reform Taskforce meeting.

   VOTE: Unanimously approved.

3. **Staff analysis of options available in providing city lien information in a centralized, accessible area.**

   Discussion deferred until July 10, 2006 meeting.

4. **Discuss Condominium Related Bills from the 2006 State Legislative Session**

   Discussion deferred until July 10, 2006 meeting.

# AD HOC CONDOMINIUM REFORM TASKFORCE MEETING
Tuesday, June 20, 2006 @ 6:00 P.M.
City Commission Chambers
**Attendance Sheet**

| NAME | E-MAIL ADDRESS | CONTACT NUMBERS | FAX NUMBER |
|---|---|---|---|
| 1. Stevan Zaiman | szaiman @ earthlink.net | 782.246.1618 | 305.531.3114 |
| 2. Michael Gongora | mgongora @ becker-poliakoff.com | 305/260-1014 | 305/442-2232 |
| 3. ANDRES R VILLARREAL | ~~www~~ AndresVillarreal @ miamibeachfl.gov | 305-306-8632 | |
| 4. Barbara B. Montero | bbm @ the-beach.net | 305 673-2812 | |
| 5. JUSTO E. GOMEZ | JGomez4010 @ AOL.com | 305-461-4155 | |
| 6. Mr Greenstein | Mgreenstein @ the-beach.net | 305-672-9696 | |
| 7. Rhonda Hasan | Rhondamontoya @ miamibeachfl.gov | 673-7470 | 673-7002 |
| 8. STEVEN ROTHSTEIN | STEVENROTHSTEIN @ MIAMIBEACHFL.GOV | 673-7470 | 673-7002 |
| 9. Tim Hemstreet | themstreet @ miamibeachfl.gov | 673-7010 | |
| 10. NINA BALIGA | nbaliga @ seiu11.org | 305-672-7071 | 672-9501 |
| 11. GEORGINA ECHERT | Narmeta @ BeachCondo.net | 305-673-7451 | |
| 12. [illegible] | @ | | |
| 13. Jean Herman | 1130 11TH St @ M.B. Unit 4A | An Observer | |
| 14 JOE FONTANA | @ | 305-861-0057 | |
| 15. | @ | | |
| 16. | @ | | |
| 17. | @ | | |
| 18. | @ | | |
| 19. | @ | | |
| 20. | @ | | |

# *Discuss all adopted Motions by the Taskforce and determine how to move each item forward.*

ITEM TWO

# STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL: CS/SB 1556

INTRODUCER: Regulated Industries Committee and Senator Geller

SUBJECT: Condominiums

DATE: March 21, 2006 REVISED: _____ _____ _____ _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Sumner | Imhof | RI | **Fav/CS** |
| 2. | Luczynski | Maclure | JU | **Pre-meeting** |
| 3. | | | | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

This bill substantially revises the provisions of the statute governing the termination of the condominium form of ownership of a property.

**Legislative Findings**

The Legislature finds that it is the public policy of the state to provide a method to preserve the value of the property interests and the rights of alienation thereof that owners have in the condominium property before and after termination.

**Plan of Termination**

The bill requires a plan of termination to be prepared and presented to the unit owners in the condominium for approval before termination can occur. The plan must provide for the valuation of the individual units, the common elements, and the other assets of the condominium based upon their respective fair market values. The plan must further set out the share that each unit owner will receive if the plan of termination is adopted, and if the property is to be sold, it must state the minimum sale terms.

**Termination Approval**

The bill provides three methods of approval of a plan of termination of the condominium form of ownership.

1. Economic Waste or Impossibility: The plan of termination may be approved by the lesser of the majority of the total voting interests or as otherwise provided in the declaration for approval when the costs to repair and restore the property to its prior condition are more than the fair market value of the property after the repairs or when it is impossible to reconstruct the physical configuration of the condominium because of the current land use laws.[1]
2. Court Approval: The bill provides that termination approval may be pursued in circuit court by one or more unit owners if the plan of termination did not receive approval by at least 80 percent the community, and fewer than 20 percent of the total voting interests voted against the plan.
3. Optional Termination: Except as provided in methods one and two or unless the declaration provides for a lower percentage, the plan of termination may be approved by 80 percent or more of the total voting interests.

The plan of termination becomes effective upon recording of the plan with the Clerk of the Circuit Court. Within 90 days of the recording, any owner who does not agree that the apportionment of the proceeds from the sale among the unit owner was fair and reasonable may bring an action in circuit court contesting the plan of termination.

**Reports and Replacement of Receiver**

The bill provides for quarterly reports prepared by the association, receiver, or termination trustee following the approval of the termination plan. The report shall provide the status and progress of the termination, costs and fees incurred, the expected completion date of termination, and the current financial condition of the association, receivership or trusteeship. Unit owners may recall or remove members of the board of administration with or without cause, and lienors of an association in termination representing at least 50 percent of the outstanding amounts of liens may petition the court for the appointment of a termination trustee upon a showing of good cause.

**Notices**

A copy of the proposed plan of termination must be given to all of the unit owners (in the same manner as for notice of the annual meeting) at least 14 days prior to the meeting at which the plan will be voted upon. Once a plan of termination is approved, each unit owner and the holders of liens on property in condominiums must be mailed notice of the plan's adoption and the right to contest the plan within 30 days of the recording with the Clerk. Within 90 days after the effective date of the plan, a certified copy of the recorded plan must be provided to the Division of Land Sales, Condominiums, and Mobile Homes. The bill also requires distribution notice. Not less than 30 days prior to the first distribution, notice of the estimated distribution shall be provided to all unit owners, lienors of the condominium property, and lienors of each unit.

[1] Under this subsection of the bill (Termination Because of Economic Waste or Impossibility), the bill also provides the method for approval of a plan of termination when 75 percent or more of the units are timeshare units. See Effect of Proposed Changes: Termination Approval section for additional details.

**Termination Trustee and Title to the Property**

Unless another person is appointed as trustee in the plan of termination, the condominium association shall serve as the "termination trustee." Once the plan is effective, the termination trustee is vested with the title to the condominium property, and the unit owners become the beneficiaries of the proceeds realized from the plan of termination. The trustee is obligated to protect and maintain the property, to sell the assets of the condominium, and disburse the proceeds to the unit owners and the mortgagees as provided for in the plan.

**Valuation of the Property**

Under the bill, the value of each unit must be determined based upon the fair market value of the units immediately before the termination by one or more independent appraisers or based upon the values maintained by the county property appraiser. Unit owners are also entitled to the fair market value of their share of the common elements, association property, and the common surplus. Each unit's total share of the proceeds must be set out in the plan of termination.

**Mortgagee Approval**

The consent of mortgagees is not required for the adoption of a plan of termination under the provisions of the bill unless the proceeds under the plan are less than the full satisfaction of the mortgage lien encumbering the unit.

This bill substantially amends section 718.117, Florida Statutes.

## II. Present Situation:

**Termination of a Condominium Property**

Section 718.117(1), F.S., requires consent of the unit owners and all of the holders of all recorded liens to agree in order to terminate a condominium unless otherwise provided in the declaration. The board of directors must notify the Division of Land Sales, Condominiums, and Mobile Homes within the Department of Business and Professional Regulation (division), before taking any action to terminate or merge the condominium or the association.

In cases of natural disaster, s. 718.117(4), F.S., provides that if the identity of the directors or their right to hold office is in doubt, or if they are dead or unable to act, or refuse or fail to act, or their whereabouts cannot be ascertained, any interested person may petition the circuit court to determine the identity of the directors or appoint a receiver.

Section 718.118, F.S., provides that in the event of substantial damage to or destruction of all or a substantial part of the condominium property, and if the property is not repaired, reconstructed, or rebuilt within a reasonable period of time, any unit owner may petition a court for equitable relief, which may include a termination of the condominium and a partition.

Problems have arisen from the destruction of condominium property caused by hurricanes. As noted in *Florida Condominium Law and Practice* published by the Florida Bar:

> In South Dade County, some condominiums were automatically terminated after Hurricane Andrew. Most were not terminated because the unit owners made an informed choice to do so; they were terminated because their associations were unable to communicate with unit owners in sufficient numbers to obtain enough votes to forestall the termination, within the short time period (usually 60 days) allowed before automatic termination. It was virtually impossible 60 days after Hurricane Andrew to find competent contractors for reconstruction. Additionally, many insurance claims were not yet filed, let alone settled, and some associations did not even know where to find their owners.[2]

Section 718.117(5), F.S., provides that after determining that all known debts and liabilities of an association in the process of winding up have been paid or adequately provided for, the board, or other person or persons appointed by the court, shall distribute all the remaining assets.

Section 718.117(9), F.S., provides that an association that has been terminated nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, collecting and discharging its obligations, disposing and conveying its property, and collecting and dividing its assets.

According to the Condominium and Planned Development Committee of the Real Property, Probate and Trust Law Section of the Florida Bar (RPPT), obtaining 100 percent agreement of all unit owners has proven to be an impossibility in many cases. A representative of the section stated that, as condominiums have aged, become obsolete, or suffered serious hurricane or other casualty damage, it has become apparent that the current statute is an impediment to terminating a condominium. Missing or intransigent owners or unresponsive mortgagees can veto termination through inaction.

The subcommittee of the Condominium and Planned Development Committee began working on revising the provisions of s. 718.117, F.S., in February 2003. Its recommendations were reviewed by the RPPT Section of the Condominium and Planned Development Committee and then the full Executive Council in November 2004. In November 2005 the initiative was approved by the section as a legislative position pursuant to the Rules Regulating the Florida Bar.[3] The Advisory Council on Condominiums has also given their approval to the bill.[4]

## III. Effect of Proposed Changes:

This bill substantially revises the provisions of the statute governing the termination of the condominium form of ownership of a property.

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[2] The Florida Bar, Florida Condominium Law and Practice §13.52 (3d ed. 2003).

[3] R. Regulating Fla. Bar 2-7.5.

[4] In 2004, the Advisory Council on Condominiums was created, in part, to receive public input regarding issues of concern with respect to condominiums and recommendations for changes in the condominium law. See s. 718.50151, F.S., which provides for the composition and functions of the council.

According to the Legislative Counsel for the Real Property, Probate and Trust Law Section of the Florida Bar (RPPT), the purpose of this bill is to revise the termination provisions in the Condominium Act. Counsel states that the bill has two primary purposes:

1. The first objective is to provide an equitable method of termination following a natural disaster or in other circumstances that fully values the interests of each unit, as well as the common elements. (Currently, the law does not contemplate valuation of the units, and places unit owners in a position of not being able to receive the market value of their investments.)
2. The second objective is to eliminate the ability of an owner or a small minority of owners from extracting an excessive portion of the termination proceeds at the expense of the other unit owners in the community. (Currently, the law allows one or more owners to withhold approval to obtain additional money and does not provide a remedy for other owners to challenge the conduct.)

**Legislative Findings**

This bill provides that it is the public policy of the state to provide a method to preserve the value of the property interests and the rights of alienation thereof that owners have in the condominium property before and after termination. It is also contrary to the public policy of this state to require the continued operation of a condominium when to do so would constitute economic waste or when the ability to do so is made impossible by law or regulation. The provisions of the section apply to all condominiums in Florida in existence on or after the effective date of the act.

**Termination Approval**

The bill provides three methods of approval of a plan of termination of the condominium form of ownership.

1. Economic Waste or Impossibility: The plan of termination may be approved by the lesser of the majority of the total voting interests or as otherwise provided in the declaration for approval when the costs to repair and restore the property to its prior condition are more than the fair market value of the property after the repairs or when it is impossible to reconstruct the physical configuration of the condominium because of the current land use laws.
2. Court Approval: The bill provides that if 80 percent of the total voting interests fail to approve the plan of termination but fewer than 20 percent of the total voting interests disapprove of the plan, the circuit court shall have jurisdiction to entertain a petition by the association or by one or more unit owners and approve the plan of termination, and the action may be a class action.

   The bill provides that all unit owners and the association must be joined as parties to the action. The action may be brought against the non-consenting unit owners as a class action. The bill provides service of process requirements.

   The bill also provides that after the consideration of whether the rights and interests of unit owners are equitably set forth in the plan of termination, the plan may be approved

or rejected by the court. The court may modify the plan of termination to provide for an equitable distribution of the interest of unit owners prior to approving the plan of termination.

3. Optional Termination: Except as provided in methods one and two or unless the declaration provides for a lower percentage, the plan of termination may be approved by 80 percent or more of the total voting interests.

However, the bill provides that these three methods of approval of termination do not apply to condominiums in which 75 percent or more of the units are timeshare units. In this situation, a condominium may only be terminated pursuant to a plan of termination approved by 80 percent of the total voting interests of the association and the holders of 80 percent of the original principal amount of outstanding recorded mortgage liens of timeshare estates in the condominium, unless the declaration provides for a lower voting percentage.

**Exemption**

The bill provides that a plan of termination is not an amendment subject to s. 718.110(4), F.S., governing material alterations to the appurtenances to the unit. Appurtenances are identified in ss. 718.106 and 718.110(4), F.S. Under theses provisions, rights such as ownership interest in the common elements and other appurtenant rights may not be changed except upon unanimous approval of the owners and lienholders, unless otherwise provided in the declaration as originally recorded.

**Mortgage Lienholders**

The bill provides that notwithstanding any provision to the contrary in the declaration or this chapter, approval of a plan of termination by the holder of a recorded mortgage lien affecting a condominium parcel in which fewer than 75 percent of the units are timeshare units is not required unless the plan of termination will result in less than the full satisfaction of the mortgage lien affecting the parcel.

**Powers in Connection with Termination**

The bill provides that the association shall continue in existence following approval of the plan of termination, with all powers it had before approval of the plan. Notwithstanding any contrary provision in the declaration or bylaws, after approval of the plan, the board has certain powers in connection with termination, which powers are necessary to continue with the business and operation of the association. These powers include the power to conduct the affairs of the association as necessary for termination or liquidation.

**Natural Disasters**

The bill provides that, if after a natural disaster, where the board of directors cannot be located, identified, or refuses to act, any interested person may petition the court to determine the identity of the directors or, if found to be in the best interests of the unit owners, to appoint a receiver to conclude the affairs of the association following notice to persons as directed by the court.

Lienholders shall be given notice of the petition and shall have the right to propose persons for the consideration by the court as receiver.

The receiver shall have all the powers given to the board by the condominium documents, by the provisions of the bill concerning the powers in connection with termination, and by any other powers that are necessary to conclude the affairs of the association and are set forth in the order of appointment.

**Reports and Replacement of Receiver**

The bill provides that the association, receiver, or termination trustee prepares quarterly reports following the approval of the plan of termination. It shall provide the status and progress of the termination, costs and fees incurred, the date the termination is expected to be completed, and the current financial condition of the association, receivership, or trusteeship. Copies are provided by regular mail to the unit owners and lienors at the mailing address provided to the association by the unit owners and the lienors.

The bill provides that unit owners may recall or remove members of the board of administration with or without cause at any time as provided in s. 718.112(2)(f), F.S.[5] The lienors of an association in termination representing at least 50 percent of the outstanding amount of liens may petition the court for the appointment of a termination trustee which shall be granted upon good cause shown.

**Plan of Termination**

The plan must be a written document executed in the same manner as a deed by unit owners having the requisite percentage of voting interests to approve the plan and by the termination trustee. A copy of the proposed plan must be given to all unit owners in the same manner as for notice of an annual meeting. Notice must be provided at least 14 days prior to the meeting during which the plan is to be voted upon or it must be provided prior to or simultaneously with the distribution of the solicitation seeking execution of the plan or written consent to or joinder in the plan. A unit owner may agree to the plan by executing the plan or by consent to or joinder in the plan in the manner of a deed. A plan of termination and the consents or joinders of unit owners and, if required, consents or joinders of mortgagees must be recorded in the public records of each county in which any portion of the condominium is located. The plan is effective only upon recordation or at a later date specified in the plan.

A plan must specify:

- The name, address, and powers of the termination trustee;
- A date after which the plan of termination is void if it has not been recorded;
- The interests of the respective unit owners in the association property, common surplus, and other assets of the association;

[5] This reference appears to be in error. Section 718.112(2)(j), F.S., provides for recall or removal of members of the board of administration.

- The interests of the respective unit owners in any proceeds from any sale of the condominium property. The plan of termination may apportion those proceeds pursuant to any of the methods prescribed in the Allocation of Proceeds section as described below. If the condominium property or real property owned by the association is to be sold following termination, the plan must provide for the sale and may establish any minimum sale terms; and
- Any interests of the respective unit owners in any insurance proceeds or condemnation proceeds that are not used for repair or reconstruction. Unless the declaration expressly addresses the distribution of insurance proceeds or condemnation proceeds, the plan of termination may apportion those proceeds pursuant to any of the methods prescribed in the Allocation of Proceeds section as described below.

The plan may provide that each unit owner retains the exclusive right of possession to the portion of the real estate that formerly constituted the unit, in which case the plan must specify the conditions of possession.

In the case of a conditional termination, the plan must specify the conditions for termination. A conditional plan will not vest title in the termination trustee until the plan and a certificate executed by the association with the formalities of a deed have been recorded that confirm the conditions in the conditional plan have been satisfied or waived by the requisite percentage of the voting interests.

**Allocation of Proceeds of Sale of Condominium Property**

Unless the declaration expressly provides for the allocation of the proceeds of sale of condominium property, the plan must first apportion the proceeds between the aggregate value of all units and the value of the common elements, based on their respective fair-market values immediately before the termination. The market values are to be determined by one or more independent appraisers selected by the association or termination trustee.

The portion of proceeds allocated to the units will be further apportioned among the individual units. The apportionment is deemed fair and reasonable if it is determined by any of the following methods: 1) the respective values of the units based on the fair-market values of the units immediately before the termination; 2) the respective values of the units based on the most recent market value of the units before the termination; or 3) the respective interests of the units in the common elements specified in the declaration immediately before the termination.

The three methods of apportionment listed above do not prohibit any other method of apportioning the proceeds of sale allocated to the units agreed upon in the plan of termination. However, the portion of the proceeds from the common elements will be divided among the units based upon their respective interests in the common elements as provided in the declaration.

Liens that encumber a unit are transferred to the proceeds of the sale of the condominium property and the proceeds of sale or other distribution of association property, common surplus, or other association assets attributable to such unit in their same priority.

**Termination Trustee**

The association will serve as termination trustee unless another person is appointed in the plan of termination. In certain circumstances, any unit owner may petition the court to appoint a trustee. Upon recording or at a later date specified in the plan, title to the condominium property vests in the trustee. Generally, the termination trustee will be vested with the powers given to the board.

If the association does not serve as the termination trustee, the trustee's powers are usually coextensive with those of the association. If the association is dissolved, the trustee will also have the powers necessary to conclude the affairs of the association.

**Title Vested in Termination Trustee**

The bill provides that, if the termination plan is pursuant to a plan approved under the provisions for (i) "Termination Because of Economic Waste or Impossibility," (ii) timeshare units, or (iii) "Optional Termination," then the unit owners' rights and title vest in the termination trustee when the plan is recorded or at a later date specified in the plan. The bill does not address when or whether the unit owners' rights and title vest in the termination trustee under the provisions dealing with "Court Approved" termination plans. It is not clear whether this omission is intentional or a technical error. The unit owners thereafter become the beneficiaries of the proceeds realized from the plan of termination. The termination trustee may deal with the condominium property or any interest therein if the plan confers on the trustee the authority to protect, conserve, manage, sell, or dispose of the condominium property. The trustee may contract for the sale of real property.

**Notice**

Within 30 days after a plan has been recorded, the termination trustee must provide notice to all unit owners, lienors of the condominium property, and lienors of all units. The notice must include certain information including that the unit owner or lienor has the right to contest the fairness of the plan.

Within 90 days after the effective date of the plan, the trustee must provide to the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation (division) a certified copy of the recorded plan as well as certain recording information.

**Right to Contest**

A unit owner or lienor may contest a plan by initiating a summary procedure, pursuant to s. 51.011, F.S., within 90 days after the date the plan is recorded.

In an action contesting a plan, the person contesting the plan has the burden of pleading and proving that the apportionment of the proceeds from the sale among the unit owners was not fair and reasonable. The apportionment of sale proceeds is presumed fair and reasonable if it was determined pursuant to the methods prescribed in the bill.

The court must adjudge the rights and interests of the parties and order the plan to be implemented if it is fair and reasonable, or the court may modify and approve the plan of termination based on findings during the court proceedings. The bill also provides that the court shall void a plan that is determined not to be fair and reasonable. In such an action, the prevailing party may recover reasonable attorney's fees and costs.

**Distribution**

Following termination, the condominium property, association property, common surplus, and other assets of the association are held by the termination trustee.

Not less than 30 days prior to the first distribution, the termination trustee must deliver a notice of the estimated distribution to all unit owners, lienors of the condominium property, and lienors of each unit stating a good-faith estimate of the amount of the distributions to each class and the procedures and deadline for notifying the termination trustee of any objections to the amount.

If a unit owner or lienor files a timely objection with the termination trustee, the trustee does not have to distribute the funds and property allocated to the respective unit owner or lienor until the trustee has had a reasonable time to determine the validity of the adverse claim. In the alternative, the bill provides for an interpleader action.

The bill provides the order of priority for distributing the proceeds of any sale of condominium property or association property and any remaining condominium property or association property, common surplus, and other assets.

After determining that all known debts and liabilities of an association in the process of termination have been paid or adequately provided for, the termination trustee will distribute the remaining assets pursuant to the plan.

Distribution may be made in money, property, or securities and in installments or as a lump sum, if it can be done fairly and ratably and in conformity with the plan of termination. Distribution shall be made as soon as is reasonably consistent with the beneficial liquidation of the assets.

**Association Status and Creation of Another Condominium**

The termination of a condominium does not change the corporate status of the association that operated the condominium property, nor does it bar the creation of another condominium.

**Exclusion**

The provisions of this bill do not apply to the termination of a condominium incident to a merger of that condominium with one or more other condominiums.

**Effective date**

The act would take effect July 1, 2006.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Condominium declarations are contracts. This bill has the effect of re-writing previously recorded declarations that have termination provisions or that implement the protections provided by s. 718.110(4), F.S., and therefore might be an unconstitutional impairment of obligation of contract, under s. 10, Art. I, Fla. Const., which provides in relevant part, "No... law impairing the obligation of contracts shall be passed." This provision empowers the courts to strike laws that retroactively burden or alter contractual relations. Article I, s. 10 of the United States Constitution provides in relevant part that "No state shall . . . pass any . . . law impairing the obligation of contracts."

In *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 776 (Fla. 1979), the court stated that some degree of flexibility has developed over the last century in interpreting the contract clause in order to ameliorate the harshness of the original rigid application used by the United States Supreme Court. The court set forth several factors in balancing whether the state law has in fact operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. The court stated that if there is minimal alteration of contractual obligations the inquiry can end at its first stage. Severe impairment can push the inquiry to a careful examination of the nature and purpose of the state legislation. The factors to be considered are:

- Whether the law was enacted to deal with a broad, generalized economic or social problem;
- Whether the law operates in an area that was already subject to state regulation at the time the contract was entered into; and
- Whether the effect on the contractual relationships is temporary or whether it is severe, permanent, immediate, and retroactive.[6]

The court in *United States Fidelity & Guaranty Co. v. Department of Insurance,* 453 So. 2d 1355 (Fla. 1984), also adopted the method used in *Pomponio.* The court stated that the

[6] *Pomponio,* 378 So. 2d at 779.

method required a balancing of a person's interest not to have his contracts impaired with the state's interest in exercising its legitimate police power.

Adopting the method of analysis used by the U.S. Supreme Court, the court outlined the main factors to be considered in applying this balancing test.

- The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."[7] The severity of the impairment increases the level of scrutiny.
- In determining the extent of the impairment, the court considered whether the industry the complaining party entered has been regulated in the past. This is a consideration because if the party was already subject to regulation at the time the contract was entered, then it is understood that it would be subject to further legislation upon the same topic.[8]
- If the state regulation constitutes a substantial impairment, the state needs a significant and legitimate public purpose behind the regulation.[9]
- Once the legitimate public purpose is identified, the next inquiry is whether the adjustment of the rights and responsibilities of the contracting parties are appropriate to the public purpose justifying the legislation.[10]

The bill addresses termination of a condominium and is therefore permanent and retroactive in nature since it could change the plan of termination originally entered into in the declaration. Thus, as to the threshold inquiry, at least on an as-applied-basis, the bill seems to operate as a substantial impairment of a contractual relationship. However, the bill does so by providing an equitable method of termination following a natural disaster or in other circumstances that fully values the interests of each unit, as well as the common elements. The bill also eliminates the ability of an owner or a small minority of owners from extracting an excessive portion of the termination proceeds at the expense of the other unit owners in the community.

Condominiums were created by statute and therefore the law operates in an area that is already subject to extensive regulation.

The legislative purpose of the statute seems to indicate that the law was enacted to deal with broad economic problems by stating that the Legislature finds that it is contrary to the public policy of the state to require the continued operation of a condominium when to do so would constitute economic waste or when the ability to do so is made impossible by law or regulation.

The last inquiry, whether the adjustment of the rights and responsibilities of the contracting parties are appropriate to the public purpose justifying the legislation, seems

[7] *United States Fidelity & Guaranty Co.*, 453 So. 2d at 1360 (quoting *Allied Structural Steel Co., v. Spannaus*, 438 U.S. 234, 244 (1978)).
[8] *Id.* (citing *Allied Structural Steel Co.*, 438 U.S. at 242, n. 13).
[9] *United States Fidelity & Guaranty Co.*, 453 So. 2d at 1360 (citing *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977)).
[10] *Id.*

to be true for the "economic waste or impossibility" method of approving a plan of termination. Where there are situations involving economic waste or impossibility, the adjustments of the rights of condominium owners concerning approval of termination of the condominium form of ownership seems reasonable and of a character appropriate to the Legislature's findings for this legislation. The other methods for approving a plan of termination may be considered unreasonable because in some circumstances they could be used for any reason to override the provisions of the declaration. Furthermore, when one of these other methods is used to override the provisions of the declaration, such use appears not to be of a character appropriate to the Legislature's finding for this legislation. Nevertheless, the adjustment of the rights and responsibilities of the contracting parties may be reasonable and appropriate because these other methods address deficiencies in the current law. As previously discussed, the current law, s. 718.117(7), F.S., places unit holders in the position of not being able to receive the market value of their investments and allowing one or more owners to withhold approval for the sale of the property[11] (after termination of the condominium) to obtain a disproportionate share of the proceeds.

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

The bill will affect the condominium owners by changing the options to terminate the condominium they had originally contracted for in the declarations of condominium.

### C. Government Sector Impact:

The bill appears to leave the termination procedures within the jurisdiction of the Division of Land Sales, Condominiums, and Mobile Homes (division) in compliance and arbitration cases. If the division receives complaints regarding the new termination procedures, it may be required to expend investigative resources for these purposes; however, the Department of Business and Professional Regulation has indicated that any fiscal impact should be accommodated within current resources.

## VI. Technical Deficiencies:

Section 718.117(9)(b) of the bill appears to reference s. 718.112(2)(f), F.S., in error as providing for recall or removal of members of the board of administration. Recall or removal is provided for in s. 718.112(2)(j), F.S.

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[11] After termination of the condominium form of ownership, the current law, s. 718.117(7), F.S., provides that the property is owned by the unit owners in the same shares as each owner previously owned in the common elements, which is typically based on the square footage of the unit, not the market value. Because all of the property is owned as tenants in common after the termination of the condominium form of ownership, one or more owners could withhold approval for the sale of the property to extract a disproportionate share of the proceeds.

The section heading "(4) Jurisdiction" is somewhat misleading. Although that subsection provides for circuit court jurisdiction, it more generally provides a method for the court to approve a termination plan in certain circumstances.

See Effect of Proposed Changes: Title Vested in Termination Trustee section for discussion of a potential technical error related to vesting of title in the termination trustee.

The bill provides that if a plan of termination is contested the court must adjudge the rights and interests of the parties and order the plan to be implemented if it is fair and reasonable. The bill seems to provide conflicting options if the court determines that the plan is not fair and reasonable. In such a case, the bill requires the court to void such a plan, but also provides that the court may modify the plan to apportion the proceeds in a fair and reasonable manner. To avoid confusion, the Legislature may wish to modify this language to provide that if the court determines that the plan is not fair and reasonable, the court may either modify the plan to apportion the proceeds in a fair and reasonable manner, or void the plan.

## VII. Related Issues:

None.

# VIII. Summary of Amendments:

None.

# MIAMIBEACH

**City of Miami Beach,** 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

## MEMORANDUM

TO: Ad Hoc Condominium Reform Taskforce

FROM: Tim Hemstreet, Assistant City Manager

DATE: July 10, 2006

SUBJECT: **AD HOC CONDOMINIUM REFORM- SUMMARY OF ACTION**

BACKGROUND

As requested at the May 30th Ad Hoc Condominium Reform Taskforce, following please find a summary of the motions made by the Taskforce. These are divided in to separate sections. The pending items are those items that have not been finalized by the Taskforce, and may require further research or action. The resolved items are those items that require no further action by the Taskforce, except transmittal to the Commission as part of the Taskforce's recommendations.

It is important to note that this is only a summary. The Taskforce made other motions, which during the course of the meetings, have either been rejected by the members or have been deemed as non-actionable due to state preemption.

- PENDING ITEMS:

Following are the items that the Taskforce has not finalized or that may require further research or action:

Meeting of 2/7/06

**1- MOTION**– City to identify submitting/pending legislation at State level of licensure of condo management companies; seconded by Nina Baliga.

**2- MOTION**– The motion is for the Taskforce identify those sections of the currently pending legislation, specifically Chapter 718.616, as to how to strengthen protections of mandatory disclosure that should be required in the conversions of condos, and as a parallel, what baseline information should be provided by the municipality (violations, delinquencies, etc.), and provide these recommendations to the Advisory Council on Condos.

Meeting of 5/2/06

1- **MOTION**– City Attorney ordinance to make it compulsory for the City Code Condo Association to notify unit owners of Code Violations. Legal to find an enforcement mechanism.

• RESOLVED ITEMS:

Following are the items that the Taskforce has voted on which require no further research or action, except transmittal to the Commission as part of the Taskforce's recommendations:

Meeting of 2/21/06

**1- MOTION:** Recommendation to the Commission that lobbying efforts be directed on behalf of City of Miami Beach to amend Ch 718.616, that disclosure requirement include disclosure to City.

**2- MOTION:** Lobbying effort approved in last motion (disclose-Ch 718.616) include the following required disclosures:
Added to 3(A) or other section to be determined by City Attorney's Office
1-outstanding municipal code violations on the premises
2-date of 40 year recertification requirement
3-accounting of the status of the capital replacement and repair reserve fund
4-current capital contracts in effect
5-any litigation respecting the premises
6-listing of all outstanding municipal or contractor liens

**Add to the motion as #7- disclosure shall include any current approved municipal occupational license and use for the premises.**

**AMENDED MOTION**: Lobbying effort approved in last motion (disclose-Ch 718.616) include the following required disclosures:
Added to 3(A) or other section to be determined by City Attorney's Office
1-outstanding municipal code (building, use, etc.) violations on the premises
2-date of 40 year recertification requirement
3-accounting of the status of the capital replacement and repair reserve fund
4-current capital contracts in effect
5-any litigation respecting the premises
6-listing of all outstanding municipal or contractor liens
7- any current approved municipal occupational license and use for the premises

Meeting of 5/30/06

**1- MOTION:** Motion to amend previously approved motion requiring Courtesy Notice for every common area violation to a requirement for courtesy notice at Special Master Hearing for common area violations and to clarify that the "Courtesy Notice" may take the form of a "mailing".

**CITY OF MIAMI BEACH**
**OFFICE OF THE CITY ATTORNEY**

# MEMORANDUM

TO: Mayor David Dermer
Members of the City Commission
Jorge Gonzalez, City Manager

FROM: Murray H. Dubbin
City Attorney

Debora J. Turner
First Assistant City Attorney

**SUBJECT: The Jurisdiction of Local Governments under the Florida Condominium Act**

DATE: January 23, 2006

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Pursuant to the request of Mayor David Dermer at the December 7, 2005 Commission meeting, the following memorandum was prepared to address questions concerning the jurisdiction of the City to enact reforms in the area of condominium conversions. Section A provides a general legal analysis of applicable preemption and conflict issues, Section B addresses the specific limitations of local governments under the Florida Condominium Act, and Section C proposes possible solutions given the limited parameters of local government action in this area.

## A. IN GENERAL: PREEMPTION AND CONFLICT ISSUES

Legislation may be enacted concurrently by both state and local governments in areas not preempted, either expressly or implied, by the state, and as long as the local concurrent legislation does not conflict with state law. City of Miami Beach v. Rocio Corp., 404 So. 2d 1066, 1070 (Fla. 3rd DCA 1981)[1]. Preemption by the state need not be explicit, so long as it is

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[1] In Rocio, the Third District, interpreting the 1979 Florida Condominium Act, which pre-dated the Roth Act (Part IV of Chapter 718 entitled "Conversions to Condominium"), found that although the 1979 version of the Act did not expressly, or by implication, preempt the subject of condominium conversion to state government, a City of Miami Beach ordinance conflicted with state law because conduct permitted by the State was not allowed by the City ordinance via the imposition of a supplementary burden (i.e., a 90 day moratorium on conversions). Therefore, the City's ordinance was enjoined from enforcement. Subsequently, the State Legislature addressed the problem when it enacted the Roth Act. That Act gave counties the authority to enact legislation to provide for lease extensions when shortages in rental units were due to condominium conversions. Both Dade and Broward Counties enacted such limited legislation in 1980. See § 17-01, Miami-Dade County Code; §§ 5-299 thru 5-301, Broward County Code.

clear that the legislature has clearly preempted local regulation of the subject." City of Miami v. Wellman, 875 So. 2d 635, 640. (Fla. 3d DCA 2004). For example, courts may "imply" preemption when "the legislative scheme is so pervasive as to evidence an intent to preempt the particular area and where strong public policy reasons exist for finding an area to be preempted by the Legislature." Tallahassee Memorial Regional Medical Center, Inc. v. Tallahassee Medical Center, Inc., 681 So. 2d 826, 831 (Fla. 1st DCA 1996) (citing Tribune Co. v. Cannella, 458 So. 2d 1075 (Fla. 1984)).[2] Moreover, preemption may not completely bar a local government from regulating on a subject, but may exist only as to narrow topics within a broader topic of a state law. See Phantom of Clearwater v. Pinellas County, 894 So. 2d 1011, 1019-1021 (Fla. 1st DCA 2005) (although county was not preempted entirely from legislating in area of fireworks, some aspects of state law arguably preempted county and certain penalty provisions of county ordinance were found to be in conflict with state law).

## B. THE FLORIDA CONDOMINIUM ACT LIMITS LOCAL GOVERNMENT REGULATION

Under the current version of Florida Condominium Act contained in Chapter 718 of the Florida Statutes, extensive and comprehensive regulations for condominiums and conversions are provided. Although not entirely preempting local regulations in this area, the Act only authorizes local government to act in certain limited areas. For example, Section 718.606(6) allows counties to enact legislation to extend rental agreements where there is a "grave housing emergency;" Section 718.507 provides that local building and zoning laws must not discriminate as to the condominium form of ownership and must apply equally to all buildings and improvements of the same kind;[3] and Section 718.616(4) requires a developer to file, with its disclosure, a letter issued by a municipality which acknowledges compliance with the applicable zoning requirements. The Act does not specifically authorize local governments to enact legislation which would be more restrictive than the State's requirements.[4] Moreover, in 1998, the Florida Legislature enacted Section 718.621 which specifically authorized the Division of Florida Land Sales, Condominiums, and Mobile Homes (the "Division") to promulgate rules

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[2] "If there is any doubt as to the extent of a power attempted to be exercised which may affect the operation of a state statute, the doubt is to be resolved against the ordinance and in favor of the statute." Wellman, 875 So. 2d at 640 (citing Rocio, 404 So. 2d at 1069 (Fla. 3d DCA 1981).

[3] See Lifter v. Metropolitan Dade County, 482 So. 2d 479 (Fla. 3d DCA 1986) (county zoning ordinance requiring notice from subdividers of hotels and motels of continued compliance with density and parking requirements did not conflict with Condominium Act).

[4] Examples of state laws that have expressly allowed local government to enact more restrictive laws include Section 553.73(4)(b) of the Florida Building Code which authorizes local governments to adopt "more stringent" technical provisions "than those specified in the Florida Building Code." See also GLA and Assoc.s, Inc. v. City of Boca Raton, 855 So. 2d 278 (Fla. 4th DCA 2003) (city ordinance providing stricter setback requirements not preempted by state Shore Preservation Act where Act expressly authorized municipalities to impose setback requirements "equal to, or more strict than" the Act).

concerning condominium conversions.

For all of the foregoing reasons, local governments are limited in their ability to regulate condominium conversions and may be precluded from adopting legislation that would impose stricter condominium conversion requirements.[5] Moreover, regardless of the extent to which local governments may be preempted under the Condominium Act, local regulations concerning condominium conversion requirements cannot be adopted that would conflict with state law. See Pinellas County; Rocio.

In view of the foregoing, the following local solutions may be explored to address concerns with regard to condominium conversions and to provide additional safeguards to the public

## C. PROPOSED SOLUTIONS TO CONDOMINIUM CONVERSION CONCERNS

### 1. Adopt Stricter Building Code Requirements

Amendments to the City Code could be considered that would apply evenly to all buildings on Miami Beach. The building recertification process for historic buildings is currently going through the Committee process. This proposal would require all buildings older than 40 years to be recertified every 5 years.

### 2. Expand Content of Municipal "Zoning Letter"

Rudolph Prinz, Bureau Chief for the Standards and Registration Division of the Department of Business and Professional Regulation, has suggested that a zoning "letter," required to be issued by a municipality pursuant to Section 718.616(4), Fla. Stat., can provide other information, in addition to that regarding "compliance with applicable zoning requirements". In such zoning "letter," a municipality can notify the State of any problems or special consideration which should be given to a particular conversion application because the condition of the building may not be fully or accurately reflected in the architect or engineer's report. As explained by Mr. Prinz, a municipality's "zoning letter" may be used, and has been used, as an opportunity to advise the State of concerns which can then be addressed at the State level and which could trigger the State to require "other" information pursuant to Section 718.502(5), Fla. Stat., in the developer's offering statement. Specifically, Section 718.502(5) states that "[i]n addition to those disclosures described by s.s. 718.503 and 718.504, the Division is authorized to require such other disclosure as deemed necessary to fully or fairly disclose all aspects of the offering."

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[5] The General Counsel for the Department of Business and Professional Regulation, concurs with our concern relative to the adoption of legislation that would impose stricter restrictions on condominium conversions as such may be preempted by, or conflict with, state law.

3. Public Education and Notification

The City's communication with Condominium residents can be expanded with regard to City-issued code violations. Efforts could include, community workshops, improved website communications, and visible posting of condominium violations.

4. Urge the Legislature to Strengthen the Condominium Act

A local government can lobby its legislators to make specific changes to Chapter 718. For example, disclosure requirements could be strengthened by the State to address concerns that: a) sufficient information is not currently provided on the report required under Section 718.616; b) the report that is submitted should go through a more thorough analysis or review when received by the State; c) condominium documents should be required to reflect restrictions on unit sizes and uses; require that all purchasers have this disclosed to them in writing and that they execute an acknowledgement to such restrictions; d) disclosure be provided in writing by realtors, registered agents, and/or other professionals involved in marketing and selling hotel/condominium units to prospective purchasers of any and all restrictions and code violations; e) encourage the State to create the statutory provisions to allow conduit financing through counties and municipalities to provide for interest free loans to condominiums to correct significant building, fire, and/or life safety violations at no risk to the participating local government (similar to Industrial Revenue Bonds); and f) encourage the State to create a grant program to partially offset the costs of building, fire, and life-safety related significant renovations for older structures.

5. Amend the City's Occupational License Code Provisions

Provisions could be considered that would require condominium associations, at license renewal, to provide confirmation that all unit owners have been provided notice of all code violations in the building's common areas.

6. Modify the City's Lien Search and Violation Search Request Forms

These forms could be modified to encourage the requestor to seek information on common areas in a building in addition to a prospective unit. (This has already been implemented).

7. Create a Community-Based Task Force

A task force could discuss the foregoing ideas and/or generate additional ideas to recommend to the City Commission. (A Commission Task Force has already been created).

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**Select Year:** 2005 Go

# The 2005 Florida Statutes

Title XL
REAL AND PERSONAL PROPERTY

Chapter 718
CONDOMINIUMS

View Entire Chapter

**718.616 Disclosure of condition of building and estimated replacement costs and notification of municipalities.--**

(1) Each developer of a residential condominium created by converting existing, previously occupied improvements to such form of ownership shall disclose the condition of the improvements and the condition of certain components and their current estimated replacement costs.

(2) The following information shall be stated concerning the improvements:

(a) The date and type of construction.

(b) The prior use.

(c) Whether there is termite damage or infestation and whether the termite damage or infestation, if any, has been properly treated. The statement shall be substantiated by including, as an exhibit, an inspection report by a certified pest control operator.

(3)(a) Disclosure of condition shall be made for each of the following components that the existing improvements may include:

1. Roof.

2. Structure.

3. Fireproofing and fire protection systems.

4. Elevators.

5. Heating and cooling systems.

6. Plumbing.

7. Electrical systems.

8. Swimming pool.

9. Seawalls.

10. Pavement and parking areas.

11. Drainage systems.

(b) For each component, the following information shall be disclosed and substantiated by attaching a copy of a certificate under seal of an architect or engineer authorized to practice in this state:

1. The age of the component.

2. The estimated remaining useful life of the component.

3. The estimated current replacement cost of the component, expressed:

a. As a total amount; and

b. As a per-unit amount, based upon each unit's proportional share of the common expenses.

4. The structural and functional soundness of the component.

(4) If the proposed condominium is situated within a municipality, the disclosure shall include a letter from the municipality acknowledging that the municipality has been notified of the proposed creation of a residential condominium by conversion of existing, previously occupied improvements and, in any county, as defined in s. 125.011(1), acknowledging compliance with applicable zoning requirements as determined by the municipality.

**History.**--s. 1, ch. 80-3; s. 22, ch. 84-368; s. 14, ch. 94-350; s. 40, ch. 95-274; s. 5, ch. 96-396; s. 7, ch. 97-301.

***Staff analysis of options available in providing city lien information in a centralized, accessible area.***

# DISCUSSION ONLY

ITEM THREE

ITEM 3

# *Discuss Condominium Related Bills from the 2006 State Legislative Session*

**ITEM FOUR**

ITEM 4

# VIII. Summary of Amendments:

None.

An act relating to condominiums; amending s. 718.117, F.S.; substantially revising provisions relating to the termination of the condominium form of ownership of a property; providing legislative findings; providing grounds for termination; providing powers and duties of the board of administration of the association; waiving certain notice requirements following natural disasters; providing requirements for a plan of termination; providing for the allocation of proceeds from the sale of condominium property; providing powers and duties of a termination trustee; providing notice requirements; providing a procedure for contesting a plan of termination; providing rules for the distribution of property and sale proceeds; providing for the association's status following termination; allowing the creation of another condominium by the trustee; specifying an exclusion; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 718.117, Florida Statutes, is amended to read:

(Substantial rewording of section. See s. 718.117, F.S., for present text.)

718.117 Termination of condominium.--



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

(1) LEGISLATIVE FINDINGS.--The Legislature finds that condominiums are created as authorized by statute. In circumstances that may create economic waste, areas of disrepair, or obsolescence of the condominium property for its intended use and thereby lower property tax values, the Legislature further finds that it is the public policy of this state to provide by statute a method to preserve the value of the property interests and the rights of alienation thereof that owners have in the condominium property before and after termination. The Legislature further finds that it is contrary to the public policy of this state to require the continued operation of a condominium when to do so would constitute economic waste or when the ability to do so is made impossible by law or regulation. The provisions of this section shall apply to all condominiums in this state in existence on or after the effective date of this act.

(2) TERMINATION BECAUSE OF ECONOMIC WASTE OR IMPOSSIBILITY.--

(a) Notwithstanding any provision to the contrary in the declaration, the condominium form of ownership of a property may be terminated by a plan of termination approved by the lesser of a majority of the total voting interests or as otherwise provided in the declaration for approval of termination in the following circumstances:

1. When the total estimated cost of repairs necessary to restore the improvements to their former condition or bring them into compliance with applicable laws or regulations exceeds the combined fair market value of all units in the condominium after completion of the repairs; or

2. When it becomes impossible to operate or reconstruct a condominium in its prior physical configuration because of land-use laws or regulations.

(b) Notwithstanding paragraph (a), a condominium in which 75 percent or more of the units are timeshare units may be terminated only pursuant to a plan of termination approved by 80 percent of the total voting interests of the association and the holders of 80 percent of the original principal amount of outstanding recorded mortgage liens of timeshare estates in the condominium, unless the declaration provides for a lower voting percentage.

(3) OPTIONAL TERMINATION.--Except as provided in subsections (2) and (4) or unless the declaration provides for a lower percentage, the condominium form of ownership of the property may be terminated pursuant to a plan of termination approved by at least 80 percent of the total voting interests of the condominium. This subsection does not apply to condominiums in which 75 percent or more of the units are timeshare units.

(4) JURISDICTION FOR PLAN-OF-TERMINATION REVIEW.--

(a) If 80 percent of the total voting interests fail to approve the plan of termination but fewer than 20 percent of the total voting interests vote to disapprove of the plan, the circuit court shall have jurisdiction to entertain a petition by the association or by one or more unit owners and approve the plan of termination, and the action may be a class action.

(b) All unit owners and the association must be parties to the action. The action may be brought against the nonconsenting unit owners as a class action. Service of process on unit owners may be by publication, but the

plaintiff must furnish each unit owner not personally served with process a copy of the petition and plan of termination, and after entry of judgment, a copy of the final decree of the court, by mail at the owner's last known address.

(c) After the consideration of whether the rights and interests of unit owners are equitably set forth in the plan of termination as required by this section, the plan of termination may be approved or rejected by the court. Consistent with the provisions of this section, the court may also modify the plan of termination to provide for an equitable distribution of the interests of unit owners prior to approving the plan of termination.

(d) This subsection does not apply to condominiums in which 75 percent or more of the units are timeshare units.

(5) EXEMPTION.--A plan of termination is not an amendment subject to s. 718.110(4).

(6) MORTGAGE LIENHOLDERS.--Notwithstanding any provision to the contrary in the declaration or this chapter, approval of a plan of termination by the holder of a recorded mortgage lien affecting a condominium parcel in which fewer than 75 percent of the units are timeshare units is not required unless the plan of termination will result in less than the full satisfaction of the mortgage lien affecting the condominium parcel. If such approval is required and not given and if the holder of a recorded mortgage lien objects to the plan of termination, such lienor may contest the plan as provided in subsection (17). At the time of sale, the lien shall be transferred to the proportionate share of the proceeds assigned to the condominium parcel in the plan of termination or as subsequently modified by the court.

(7) POWERS IN CONNECTION WITH TERMINATION.--The association shall continue in existence following approval of the plan of termination with all powers it had before approval of the plan. Notwithstanding any contrary provision in the declaration or bylaws, after approval of the plan the board has the power and duty:

(a) To employ directors, agents, attorneys, and other professionals to liquidate or conclude its affairs.

(b) To conduct the affairs of the association as necessary for the liquidation or termination.

(c) To carry out contracts and collect, pay, and settle debts and claims for and against the association.

(d) To defend suits brought against the association.

(e) To sue in the name of the association for all sums due or owed to the association or to recover any of its property.

(f) To perform any act necessary to maintain, repair, or demolish unsafe or uninhabitable improvements or other condominium property in compliance with applicable codes.

(g) To sell at public or private sale or to exchange, convey, or otherwise dispose of assets of the association for an amount deemed to be in the best interests of the association, and to execute bills of sale and deeds of conveyance in the name of the association.

(h) To collect and receive rents, profits, accounts receivable, income, maintenance fees, special assessments, or insurance proceeds for the association.

(i) To contract and do anything in the name of the association which is proper or convenient to terminate the affairs of the association.

(8) NATURAL DISASTERS.--

(a) If, after a natural disaster, the identity of the directors or their right to hold office is in doubt, if they are deceased or unable to act, if they fail or refuse to act, or if they cannot be located, any interested person may petition the circuit court to determine the identity of the directors or, if found to be in the best interests of the unit owners, to appoint a receiver to conclude the affairs of the association after a hearing following notice to such persons as the court directs. Lienholders shall be given notice of the petition and have the right to propose persons for the consideration by the court as receiver.

(b) The receiver shall have all powers given to the board pursuant to the declaration, bylaws, and subsection (7), and any other powers that are necessary to conclude the affairs of the association and are set forth in the order of appointment. The appointment of the receiver is subject to the bonding requirements of such order. The order shall also provide for the payment of a reasonable fee to the receiver from the sources identified in the order, which may include rents, profits, incomes, maintenance fees, or special assessments collected from the condominium property.

(9) REPORTS AND REPLACEMENT OF RECEIVER.--

(a) The association, receiver, or termination trustee shall prepare reports each quarter following the approval of the plan of termination setting forth the status and progress of the termination, costs and fees incurred, the date the termination is expected to be completed, and the current financial condition of the association, receivership, or trusteeship and provide copies of the report by regular mail to the unit owners and lienors at the mailing address provided to the association by the unit owners and the lienors.

(b) The unit owners of the association in termination may recall or remove members of the board of administration with or without cause at any time as provided in s. 718.112(2)(j).

(c) The lienors of an association in termination representing at least 50 percent of the outstanding amount of liens may petition the court for the appointment of a termination trustee which shall be granted upon good cause shown.

(10) PLAN OF TERMINATION.--The plan of termination must be a written document executed in the same manner as a deed by unit owners having the requisite percentage of voting interests to approve the plan and by the termination trustee. A copy of the proposed plan of termination shall be given to all unit owners, in the same manner as for notice of an annual meeting, at least 14 days prior to the meeting at which the plan of termination is to be voted upon or prior to or simultaneously with the distribution of the solicitation seeking execution of the plan of termination or written consent to or joinder in the plan. A unit owner may document assent to the plan of termination by executing the plan or by consent to or joinder in the plan in the manner of a deed. A plan of termination and the consents or joinders of unit owners and, if required, consents or joinders of mortgagees must be recorded in the public records of each county in which any portion of the condominium is located. The plan of termination is effective only upon recordation or at a later date specified in the plan.

(11) PLAN OF TERMINATION; REQUIRED PROVISIONS.--The plan of termination must specify:

(a) The name, address, and powers of the termination trustee.

(b) A date after which the plan of termination is void if it has not been recorded.

(c) The interests of the respective unit owners in the association property, common surplus, and other assets of the association, which shall be the same as the respective interests of the unit owners in the common elements immediately before the termination, unless otherwise provided in the declaration.

(d) The interests of the respective unit owners in any proceeds from any sale of the condominium property. The plan of termination may apportion those proceeds pursuant to any of the methods prescribed in subsection (13). If, pursuant to the plan of termination, condominium property or real property owned by the association is to be sold following termination, the plan must provide for the sale and may establish any minimum sale terms.

(e) Any interests of the respective unit owners in any insurance proceeds or condemnation proceeds that are not used for repair or reconstruction at the time of termination. Unless the declaration expressly addresses the distribution of insurance proceeds or condemnation proceeds, the plan of termination may apportion those proceeds pursuant to any of the methods prescribed in subsection (13).

(12) PLAN OF TERMINATION; OPTIONAL PROVISIONS; CONDITIONAL TERMINATION.--

(a) The plan of termination may provide that each unit owner retains the exclusive right of possession to the portion of the real estate that formerly constituted the unit, in which case the plan must specify the conditions of possession.

(b) In the case of a conditional termination, the plan must specify the conditions for termination. A conditional plan does not vest title in the termination trustee until the plan and a certificate executed by the association with the formalities of a deed, confirming that the conditions in the conditional plan have been satisfied or waived by the requisite percentage of the voting interests, have been recorded.

(13) ALLOCATION OF PROCEEDS OF SALE OF CONDOMINIUM PROPERTY.--

(a) Unless the declaration expressly provides for the allocation of the proceeds of sale of condominium property, the plan of termination must first apportion the proceeds between the aggregate value of all units and the value of the common elements, based on their respective fair-market values immediately before the termination, as determined by one or more independent appraisers selected by the association or termination trustee.

(b) The portion of proceeds allocated to the units shall be further apportioned among the individual units. The apportionment is deemed fair and reasonable if it is determined by the unit owners approving the plan of termination by any of the following methods:

1. The respective values of the units based on the fair-market values of the units immediately before the termination, as determined by one or more independent appraisers selected by the association or termination trustee;

2. The respective values of the units based on the most recent market value of the units before the termination, as provided in the county property appraiser's records; or



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

3. The respective interests of the units in the common elements specified in the declaration immediately before the termination.

(c) The methods of apportionment in paragraph (b) do not prohibit any other method of apportioning the proceeds of sale allocated to the units agreed upon in the plan of termination. The portion of the proceeds allocated to the common elements shall be apportioned among the units based upon their respective interests in the common elements as provided in the declaration.

(d) Liens that encumber a unit shall be transferred to the proceeds of sale of the condominium property and the proceeds of sale or other distribution of association property, common surplus, or other association assets attributable to such unit in their same priority. The proceeds of any sale of condominium property pursuant to a plan of termination may not be deemed to be common surplus or association property.

(14) TERMINATION TRUSTEE.--The association shall serve as termination trustee unless another person is appointed in the plan of termination. If the association is unable, unwilling, or fails to act as trustee, any unit owner may petition the court to appoint a trustee. Upon the date of the recording or at a later date specified in the plan, title to the condominium property vests in the trustee. Unless prohibited by the plan, the termination trustee shall be vested with the powers given to the board pursuant to the declaration, bylaws, and subsection (7). If the association is not the termination trustee, the trustee's powers shall be coextensive with those of the association to the extent not prohibited in the plan of termination or the order of

appointment. If the association is not the termination trustee, the association shall transfer any association property to the trustee. If the association is dissolved, the trustee shall also have such other powers necessary to conclude the affairs of the association.

(15) TITLE VESTED IN TERMINATION TRUSTEE.--If termination is pursuant to a plan of termination under subsection (2), subsection (3), or subsection (4), the unit owners' rights and title as tenants in common in undivided interests in the condominium property vest in the termination trustee when the plan is recorded or at a later date specified in the plan. The unit owners thereafter become the beneficiaries of the proceeds realized from the plan of termination. The termination trustee may deal with the condominium property or any interest therein if the plan confers on the trustee the authority to protect, conserve, manage, sell, or dispose of the condominium property. The trustee, on behalf of the unit owners, may contract for the sale of real property, but the contract is not binding on the unit owners until the plan is approved pursuant to subsection (2), subsection (3), or subsection (4).

(16) NOTICE.--

(a) Within 30 days after a plan of termination has been recorded, the termination trustee shall deliver by certified mail, return receipt requested, notice to all unit owners, lienors of the condominium property, and lienors of all units at their last known addresses that a plan of termination has been recorded. The notice shall include the book and page number of the public records in which the plan was recorded, notice that a copy of the plan shall be

furnished upon written request, and notice that the unit owner or lienor has the right to contest the fairness of the plan.

(b) The trustee, within 90 days after the effective date of the plan, shall provide to the division a certified copy of the recorded plan, the date the plan was recorded, and the county, book, and page number of the public records in which the plan was recorded.

(17) RIGHT TO CONTEST.--A unit owner or lienor may contest a plan of termination by initiating a summary procedure pursuant to s. 51.011 within 90 days after the date the plan is recorded. A unit owner or lienor who does not contest the plan within such 90-day period is barred from asserting or prosecuting a claim against the association, the termination trustee, any unit owner, or any successor in interest to the condominium property. In an action contesting a plan of termination, the person contesting the plan has the burden of pleading and proving that the apportionment of the proceeds from the sale among the unit owners was not fair and reasonable. The apportionment of sale proceeds is presumed fair and reasonable if it was determined pursuant to the methods prescribed in subsection (13). The court shall adjudge the rights and interests of the parties and order the plan of termination to be implemented if it is fair and reasonable. If the court determines that the plan of termination is not fair and reasonable, the court may void the plan or may modify the plan to apportion the proceeds in a fair and reasonable manner as required by this section based upon the proceedings and order the modified plan of termination to be implemented. In such action, the prevailing party may recover reasonable attorney's fees and costs.

(18) DISTRIBUTION.--

(a) Following termination of the condominium, the condominium property, association property, common surplus, and other assets of the association shall be held by the termination trustee, as trustee for unit owners and holders of liens on the units, in their order of priority.

(b) Not less than 30 days prior to the first distribution, the termination trustee shall deliver by certified mail, return receipt requested, a notice of the estimated distribution to all unit owners, lienors of the condominium property, and lienors of each unit at their last known addresses stating a good-faith estimate of the amount of the distributions to each class and the procedures and deadline for notifying the termination trustee of any objections to the amount. The deadline must be at least 15 days after the date the notice was mailed. The notice may be sent with or after the notice required by subsection (16). If a unit owner or lienor files a timely objection with the termination trustee, the trustee need not distribute the funds and property allocated to the respective unit owner or lienor until the trustee has had a reasonable time to determine the validity of the adverse claim. In the alternative, the trustee may interplead the unit owner, lienor, and any other person claiming an interest in the unit and deposit the funds allocated to the unit in the court registry, at which time the condominium property, association property, common surplus, and other assets of the association are free of all claims and liens of the parties to the suit. In an interpleader action, the trustee and prevailing party may recover reasonable attorney's fees and costs and court costs.

(c) The proceeds of any sale of condominium property or association property and any remaining condominium property

or association property, common surplus, and other assets shall be distributed in the following priority:

1. To pay the reasonable termination trustee's fees and costs and accounting fees and costs.

2. To lienholders of liens recorded prior to the recording of the declaration.

3. To purchase money lienholders on units to the extent necessary to satisfy their liens.

4. To lienholders of liens of the association which have been consented to under s. 718.121(1).

5. To creditors of the association, as their interests appear.

6. To unit owners, the proceeds of any sale of condominium property subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or lienor.

7. To unit owners, the remaining condominium property, subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor as provided in paragraph (b).

8. To unit owners, the proceeds of any sale of association property, the remaining association property, common surplus, and other assets of the association, subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor as provided in paragraph (b).

(d) After determining that all known debts and liabilities of an association in the process of termination

have been paid or adequately provided for, the termination trustee shall distribute the remaining assets pursuant to the plan of termination. If the termination is by court proceeding or subject to court supervision, the distribution may not be made until any period for the presentation of claims ordered by the court has elapsed.

(e) Assets held by an association upon a valid condition requiring return, transfer, or conveyance, which condition has occurred or will occur, shall be returned, transferred, or conveyed in accordance with the condition. The remaining association assets shall be distributed pursuant to paragraph (c).

(f) Distribution may be made in money, property, or securities and in installments or as a lump sum, if it can be done fairly and ratably and in conformity with the plan of termination. Distribution shall be made as soon as is reasonably consistent with the beneficial liquidation of the assets.

(19) ASSOCIATION STATUS.--The termination of a condominium does not change the corporate status of the association that operated the condominium property. The association continues to exist to conclude its affairs, prosecute and defend actions by or against it, collect and discharge obligations, dispose of and convey its property, and collect and divide its assets, but not to act except as necessary to conclude its affairs.

(20) CREATION OF ANOTHER CONDOMINIUM.--The termination of a condominium does not bar the creation by the termination trustee of another condominium affecting any portion of the same property.

(21) EXCLUSION.--This section does not apply to the termination of a condominium incident to a merger of that condominium with one or more other condominiums under s. 718.110(7).

Section 2. This act shall take effect July 1, 2006.

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 391 CS Community Associations
**SPONSOR(S):** Domino
**TIED BILLS:** None. **IDEN./SIM. BILLS:** None.

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Civil Justice Committee | 7 Y, 0 N, w/CS | Blalock | Bond |
| 2) Judiciary Appropriations Committee | 4 Y, 0 N, w/CS | Brazzell | DeBeaugrine |
| 3) Justice Council | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located. A declaration of condominium may be amended as provided in the declaration. This bill revises provisions of law regarding certain mortgagees' ability to approve or void certain amendments to condominium declarations, articles of incorporation, or bylaws.

A homeowners' association is a corporation responsible for the operation of a community in which voting membership is made up of parcel ownership and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel. This bill increases the regulation of homeowners' associations and establishes conformity in the laws regulating homeowners' associations and condominium associations by:

- Revising the requirements for the inspection and copying of records;
- Revising what must be included in the associations' annual budget;
- Clarifying rights and privileges of parcel owners regarding homeowners' association decisions about structures and parcel improvements;
- Revising the financial reporting requirements; and
- Providing for guarantees of common expenses when they are not included in the declaration.

This bill also eliminates mediation of disputes between homeowners' associations and members from the jurisdiction of the Department of Business of Professional Regulation. The mandatory mediation of such disputes will have to be conducted by private mediators.

This bill appears to have a minimal negative fiscal impact on state revenues. This bill does not appear to have a fiscal impact on local governments.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: This bill eliminates the current requirement that certain disputes between homeowners and homeowners associations be referred to the Department of Business and Professional Regulation for assignment of a mediator.

Safeguard Individual Liberty: This bill decreases restrictions on condominium associations when amending declarations of condominium, articles of incorporation, or bylaws. This bill increases regulation of homeowners' associations.

B. EFFECT OF PROPOSED CHANGES:

**Background**

A condominium is a "form of ownership of real property created pursuant to ch. 718, F.S., which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements".[1] A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located.[2] A declaration is like a constitution in that it:

> strictly governs the relationships among condominium units owners and the condominium association. Under the declaration, the Board of the condominium association has broad authority to enact rules for the benefit of the community.[3]

A declaration may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.[4] A declaration of condominium may be amended as provided in the declaration. If the declaration does not provide a method for amendment, it may generally be amended as to any matter by a vote of two-thirds of the units.[5]

Homeowners' association means a Florida corporation responsible for the operation of a subdivision in which voting membership is made up of parcel ownership and in which membership is a mandatory condition of parcel ownership and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.[6] Homeowners' associations are regulated under chapter 720, F.S.

**Effect of Bill**

Covenant Revitalization

*Proposed Changes*

This bill creates s. 712.11, F.S., to provide that a homeowners' association that is not subject to chapter 720 may use the procedures established in ss. 720.403, F.S. - 720.407, F.S., to revive covenants that have lapsed under the terms of chapter 712, F.S.

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[1] Section 718.103(11), F.S.
[2] Section 718.104(2), F.S.
[3] *Neuman v. Grand View at Emerald Hills*, 861 So.2d 494, 496-497 (Fla. 4th DCA 2003)
[4] Section 718.104(5), F.S.
[5] Section 718.110(1)(a), F.S.
[6] Section 720.301(9), F.S.

Mortgagee Consent or Joinder of Amendments to Declaration of Condominium

*Current Law*

Section 718.110(11), F.S., provides that any declaration of condominium recorded after April 1, 1992, may not require the consent or joinder of mortgagees in order for an association to pass an amendment to the declaration. This is limited to amendments which do not materially affect the rights or interests of the mortgagees, or as otherwise required by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation. Current law provides that such consent may not be unreasonably withheld. In the event mortgagee consent is provided other than by properly recorded joinder, such consent must be evidenced by affidavit of the association recorded in the public records of the county where the declaration is recorded.[7]

*Proposed Changes*

The bill provides findings by the Legislature that consent or joinder to amendments that do not materially affect the rights or interests of mortgagees is unreasonable and is a substantial burden on the condominium owners and association. This bill also provides that there is a compelling state interest in enabling condominium association members to approve amendments.

The bill limits the enforceability of certain provisions in or amendments to declarations, articles of incorporation or bylaws that require the consent or joinder of some or all mortgagees of units or any other portion of the condominium property for those mortgages recorded on or after October 1, 2006. Such provisions or amendments recorded prior to October 1, 2006, remain enforceable. The bill provides a process for obtaining addresses of mortgagees and contacting them to obtain their consent or joinder.

Failure of any mortgagee to respond to a request for the consent or joinder to a proposed amendment within 60 days after the date that a request is sent to the mortgagee is deemed to have consented to the amendment. The bill also limits the ability of certain mortgagees to void amendments.

Mixed-Use Condominiums

*Current Law*

Section 718.404, F.S, pertains to mixed-use condominiums, which are condominiums where there are both residential and commercial units. Section 718.404(1), F.S., provides that for mixed-use condominiums, the owner of a commercial unit does not have the authority to veto amendments to the declaration, articles of incorporation, bylaws, or rules or regulations of the association. Section 718.404(2), F.S., is also amended to provide that when the number of residential units is equal to or greater than 50% of the total number of units operated by the association, owners of the residential units are entitled to vote for a majority of the seats on the board of administration.

*Proposed Changes*

This bill amends subsections (1) and (2) of s. 718.404, F.S., to provide that these subsections are intended to be applied retroactively as a remedial measure.

Homeowners' Associations

*Current Law*

Current law regulates homeowners' associations in ch. 720, F.S., and s. 720.302, F.S., provides that ch. 720, F.S. does not apply to condominium associations.

[7] Section 718.110(11), F.S.

*Proposed Changes*

This bill amends s. 720.302, F.S., to provide an exception to the current law providing that chapter 720, which regulates homeowners' associations, does not apply to condominium associations.

This bill amends s. 720.302(4), F.S. to provide that ch. 720, F.S. does not apply to any association regulated under chapters 718 (condominiums), 719 (cooperatives), 721 (timeshares), or 723 (mobile home parks), except to the extent that a provision of ch. 718, 719, or 721, F.S. is expressly incorporated into ch. 720, F.S. for the purpose of regulating homeowners' associations.

This bill amends s. 720.302(5), F.S., to remove the phrase "not for profit" to conform to the other changes in this section. This bill also amends s. 720.302(5), F.S., to provide that corporations operating residential homeowners' associations in Florida are to be governed by and subject to ch. 607, F.S. (corporations), if the association was incorporated under the provisions of that chapter, or to ch. 617, F.S. (not for profit corporations), if the association was incorporated under the provisions of that chapter.

Homeowners' Association Board Meetings

*Current Law*

Section 720.303(2), F.S., provides procedures for association board meetings. A meeting of the board occurs whenever a quorum of the board gathers to conduct association business. Board meetings are open to all members, except for those meetings between the board and its attorney relating to proposed or pending litigation. Members also have the right to attend all board meetings and speak on any matter on the agenda for at least 3 minutes.

Notice of a board meeting must be posted in a conspicuous place in the community at least 48 hours prior to a meeting, except in an emergency. If notice of the board meeting is not posted in a conspicuous place, then notice of the board meeting must be mailed or delivered to each association member at least 7 days prior to the meeting, except in an emergency. For associations that have more than 100 members, the bylaws may provide for a reasonable alternative to this posting or mailing requirement. These alternatives include publication of notice, provision of a schedule of board meetings, conspicuous posting and repeated broadcasting of a notice in a certain format on a closed-circuit cable television system serving the association, or electronic transmission if the member consents in writing to such transmission.[8]

A board may not levy assessments at a meeting unless the notice of the meeting includes the nature of those assessments and a statement that the assessments will be considered at the meeting.[9]

Directors may not vote by proxy or by secret ballot at board meetings, except that secret ballots may be used in the election of officers. This also applies to meetings of any committee or similar body when a final decision will be made regarding the spending of association funds. Proxy voting or secret ballots are also not allowed when a final decision will be made on approving or disapproving architectural decisions with respect to a specific parcel of residential property owned by a member of the community.[10]

*Proposed Changes*

[8] Section 720.303(2)(c)1, F.S.
[9] Section 720.303(2)(c)2, F.S.
[10] Section 720.303(2)(c)3, F.S.

This bill amends s. 720.303(2)(a), F.S., as amended by section 18 of chapter 2004-345 and section 135 of chapter 2005-2, Laws of Florida,[11] to provide that provisions of this subsection which requires open meetings also apply to the meetings of any committee or other similar body when a final decision is made regarding the spending of association funds and to meetings of any body vested with the power to approve or disapprove architectural decisions with respect to a specific parcel of residential property owned by a member of the community.

This bill also repeals s. 720.303(2), F.S., as amended by section 2 of chapter 2004-345 and section 15 of chapter 2004-353, Laws of Florida, to remove conflicting versions of this subsection.

Homeowners' Association Inspection and Copying of Records

*Current Law*

Section 720.303(5), F.S., requires that a homeowners' association allow its members to inspect and copy its official records within 10 days of a written request for access. A failure to comply with such a request in a timely fashion creates a rebuttable presumption that the association failed to do so, and entitles the requesting party to actual damages, or to a minimum of $50 per calendar day, commencing on the eleventh business day. A homeowners' association may adopt reasonable written rules governing the frequency, time, location, notice, records to be inspected, and manner of inspections but may not impose a requirement that a parcel owner demonstrate any proper purpose for the inspection, state any reason for the inspection, or limit a parcel owner's right to inspect records less than one 8-hour business day per month. The association may impose fees to cover the costs of providing copies of the official records, including without limitation, the costs of copying. The association may charge up to 50 cents per page for copies made on the association's copy machine. If the association does not have a copy machine available where the records are kept, or if the records requested to be copied exceed 25 pages, then the association may have copies made by an outside vendor and may charge the actual cost of copying.

Current law expressly exempts the following from inspection by a member or parcel owner: any record protected by attorney-client or work-product privilege; information obtained in association with the lease, sale or transfer of a parcel that is otherwise privileged by state or federal law; disciplinary, health, insurance and personnel records of the association's employees; or medical records of parcel owners or other community residents.[12]

*Proposed Changes*

This bill amends s. 720.303(5), F.S., to provide that an association or its agent is not required to provide a prospective purchaser or lienholder with information about the residential subdivision or the association unless required by this chapter to be made available or disclosed. This bill also provides that an association or agent may charge a reasonable fee to a prospective purchaser or lienholder or the current parcel owner or member for providing good faith responses to requests for information, except for information required by law. The fee cannot exceed $50 plus the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the response.

Homeowners' Association Budgets

*Current Law*

Section 720.303(6), F.S., provides that an association must prepare an annual budget.

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[11] In 2004 the Legislature passed SB 1184, which amended s. 720.303(2),F.S., in section 2 and section 18 of the bill. In 2004, the Legislature passed SB 2984, which also amended s. 720.303(2), F.S., in section 15 of the bill. This bill is amending s. 720.303(2), F.S., as amended by section 18 of chapter 2004-345 and section 135 of chapter 2005-2, Laws of Florida, and is repealing s. 720.303(2), F.S., as amended by section 2 of chapter 2004-345 and section 15 of chapter 2004-353, Laws of Florida.

[12] Section 720.303(1), (2), (3), (4), F.S.

*Proposed Changes*

This bill amends s. 720.303(6), F.S., to require that:

- The annual budget provide for the annual operating expenses and the budget must be paid for by the association.
- The annual budget may include reserve accounts for capital expenditures and deferred maintenance for which the association is responsible to the extent that the association's governing documents do not limit increases in assessments.
- If the budget of the association does not provide for reserve accounts and the association is responsible for the repair and maintenance of capital improvements that may result in special assessments if reserves are not provided, each financial report for the preceding fiscal year must contain a statement in conspicuous type as provided by the bill.
- An association is deemed to have provided for reserve accounts when reserve accounts have been initially established by the developer or when the membership of the association affirmatively elects to provide for reserves. Once established, the reserve accounts must be funded, maintained or funding waived.
- The amount to be reserved must be computed by using a formula that is based upon estimated remaining useful life and estimated replacement cost or deferred maintenance expense of each reserve item.
- Once a reserve account or reserve accounts are established, the membership of the association may provide for no reserves or less reserves.
- After the turnover, a developer may vote its voting interest to waive or reduce the funding of reserves.
- Reserve funds and any interest shall remain in the reserve account, and may be used only for authorized reserve expenditures.
- Prior to turnover of control of an association by a developer to parcel owners, the developer-controlled association may not vote to use reserves for purposes other than that for which they were intended without the approval of a majority of all non-developer voting interests.

Homeowners' Association Financial Reporting

*Current Law*

Section 720.303(7), F.S., requires homeowners' associations to prepare an annual financial report within 60 days after the close of the fiscal year. The association must provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member.

*Proposed Changes*

This bill amends s. 720.303(7), F.S., to increase from 60 to 90 days the time that an association has to prepare and complete an annual financial report after the close of the fiscal year. Within 21 days after the final financial report is completed by the association, but no later than 120 days after the end of the fiscal year, the association must provide each member with a copy of the annual financial report.

This bill amends s. 720.303(7)(a), F.S., to provide that financial statements are to be completed in accordance with the accounting principles adopted by the Florida Board of Accountancy.

Architectural Control Covenants and Parcel Owner Improvements

*Proposed Changes*

This bill creates s. 720.3035, F.S., to provide that:

- An association may review and approve plans and specifications for the location, size, type or appearance of any structure, or enforce such standards, only to the extent as specifically stated or reasonably inferred in the declaration of covenants.
- An association may only restrict the right of a parcel owner to select from options for the use of material, the size or design of the structure or improvement, or the location of the structure or improvement on the parcel as provided in the declaration of covenants.
- For the purpose of establishing setback lines specifically stated in the declaration of covenants, each parcel may be deemed to have only one front. When the declaration of covenants does not provide for specific setback lines, the applicable county or municipal setback lines shall apply.
- Each parcel owner is entitled to the rights and privileges provided in the declaration of covenants concerning the use of the parcel, and the construction of permitted structures and improvements on the parcel and such rights and privileges shall not be unreasonably impaired by the association.
- An association may not enforce any policy that is inconsistent with the rights and privileges of a parcel owner set forth in the declaration of covenants, whether the policy is uniformly applied or not.

Attorney's Fees for Actions between an Association and a Member

*Current Law*

Section 720.305, F.S., provides that an action to enforce the rules and provisions established by the homeowners' association can be brought by the association or by any member against the association, a member, any director of the association, and any tenants, guests, or invitees occupying a parcel or common area. This section also provides that the prevailing party in any litigation is entitled to recover reasonable attorney's fees and costs. A member that has successfully sued his or her association must, under current law, return a portion of those fees back to the association. Thus, under current law a member cannot be fully compensated for his or her attorney's fees.

*Proposed Changes*

This bill amends s. 720.305, F.S., to provide that any member who prevails against an association and is awarded attorney's fees may also be awarded an amount sufficient to cover the member's pro-rata portion of those fees.

Meetings of Association Members; Amendments

*Current Law*

Section 720.306(1)(c), F.S., provides that an amendment may not materially and adversely alter the proportionate voting interest attached to a parcel or increase the proportion or percentage by which a parcel shares in the common expenses of the association, unless all owners and lienholders join in the execution of the amendment. A change in quorum requirements is not an alteration of voting interests.

*Proposed Changes*

The bill amends s. 720.306(1)(c), F.S., adding the provision that the merger or consolidation of associations under ch. 607, F.S. (regulating corporations) or ch. 617, F.S. (regulating non-profit corporations), is not considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel.

Transition of Homeowners' Association Control

*Current Law*

Section 720.307, F.S., provides procedures for turning over control of an association from the developer to parcel owners. The transition of association control begins with the election of the board of directors of the homeowners' association by the members. At the time the members elect the board of directors, the developer must deliver various documents to the board.

*Proposed Changes*

This bill amends s. 720.307, F.S., to provide an additional document that the developer must provide to the board of directors. Along with the documents that must be provided by the developer under current law, the bill requires that the developer also provide the board of directors the financial records, including the statements of the association, and source documents from the incorporation of the association through the date of turnover. This bill also provides that an independent certified public accountant must audit the records and determine that the developer was charged with, and paid, the proper amounts of assessments.

The language in this section of the bill is taken from language found in s. 718.301(4)(c), F.S., of the Condominium Act. The current law for homeowners' associations pertaining to transition of association control is very similar to the current Condominium Act and this bill provides conformity between homeowners' associations and the condominium associations.

Guarantees of Common Expenses

*Current Law*

The developer of a community is responsible for paying the costs of the common expenses of the community until the sale of the parcels to a purchaser at which time the developer pays a proportionate share of the common expenses with the parcel owners. Condominium law allows a developer to be excused from payment of common expenses if the common expenses of all unit owners are guaranteed not to increase and the developer agrees to pay all common expenses incurred but not covered by unit owner payments during the period of the guarantee.[13]

*Proposed Changes*

This bill amends s. 720.308, F.S., to incorporate the guarantees of common expenses provision found in condominium law into homeowners' association law. Currently, s. 720.308, F.S., provides for guarantees of common expenses if it is provided for in the declaration. This bill amends s. 720.308, F.S., to provide for guarantees of common expenses if a guarantee is not included in the purchase contract or declaration. This bill provides that a guarantee is effective only upon approval of a majority of the voting interests of the members other than the developer. This bill also provides that:

- The time period of a guarantee must have a specific beginning and ending date or event;
- The dollar amount of the guarantee must be an exact dollar amount for each parcel identified in the declaration;
- The cash payments required from the developer must be when the revenue collected by the association are not sufficient to provide payment for all common expenses; and
- The expenses incurred in the production of non-assessment revenues, not in excess of the non-assessment revenues, must not be included in the common expenses. If expenses attributable to non-assessment revenues exceed non-assessment revenues, then the developer must only fund the excess expenses.

[13] Section 718.116, F.S.

Dispute Resolution

*Current Law*

Section 720.311, F.S., established dispute resolution procedures for homeowners' associations and their members. Current law requires that recall disputes must be resolved by binding arbitration conducted by the Department of Business and Professional Regulation (DBPR). Any recall dispute filed with the DBPR must be conducted in accordance with the provisions of ss. 718.1255 and 718.112(2)(j), F.S., which establish requirements and procedures for the removal of condominium directors and dispute resolution procedures for condominiums. Section 718.1255, F.S., requires that arbitration proceedings relating to the recall of a condominium director must be conducted pursuant to the arbitration procedures in s. 718.1255, F.S., and provides that, if the condominium association fails to comply with the final order of arbitration, the DBPR may take action pursuant to s. 718.501, F.S. Section 718.501, F.S., establishes the powers and duties of the DBPR, which include the power to conduct investigations, issue orders, conduct consent proceedings, bring actions in civil court on behalf of unit owners, lessees, or purchasers for declaratory relief, injunctive relief, or restitution, and to assess civil penalties.

Section 720.311(1), F.S., provides that the DBPR must conduct mandatory binding arbitration of election disputes in accordance with s. 718.1255, F.S. Election and recall disputes are not eligible for mediation. Current law requires a $200 filing fee and authorizes the DBPR to assess the parties an additional fee in an amount adequate to cover the DBPR's costs and expenses. The fee paid to the DBPR must be a recoverable cost in the arbitration proceeding, and the prevailing party must be paid its reasonable costs and attorney's fees in an amount found reasonable by the arbitrator. Section 720.311(1), F.S., provides that any petition for mediation or arbitration shall toll the applicable statute of limitations. The statute authorizes the DBPR to adopt rules to implement this section.

Section 720.311(2)(a), F.S., provides that the following disputes must be filed with the DBPR for mandatory mediation by the division before the dispute is filed in court:

- Disputes between an association and a parcel owner regarding use of, or changes to, the parcel or the common areas and other covenant enforcement disputes;
- Disputes regarding amendments to the association documents;
- Disputes regarding meetings of the board and committees appointed by the board;
- Disputes regarding membership meetings not including election meetings; and
- Disputes regarding access to the official records of the association.

The mediation is conducted under the applicable Florida Rules of Civil Procedure, and the proceeding is privileged and confidential to the same extent as court-ordered mediation. Current law provides that persons not a party to the suit may not attend the mediation conference without the consent of all the parties. Current law also requires a $200 fee to defray the costs of the mandatory mediation, authorizes the DBPR to charge additional fees to cover the costs of the mandatory mediation, and requires that the parties share the costs of mediation equally, unless the parties agree otherwise. If the mandatory mediation is not successful, the parties may file the dispute in a court or enter the dispute into binding or non-binding arbitration to be conducted by the DBPR or private arbitrator. Section 720.311(2)(d), F.S., provides that the mediation procedure may be used by non-mandatory homeowners' associations.

Section 720.311(2)(c), F.S., provides standards to DBPR certification and training of mediators and arbitrators and requires that DBPR-certified mediators must also be certified by the Florida Supreme Court.

Section 720.311(3), F.S., currently provides that the DBPR must develop an education program to assist homeowners, associations, board members, and managers in understanding the use of alternative dispute resolution techniques in resolving disputes between parcel owners and associations

or between owners. Current law also provides that the certification program for arbitrators and mediators and the education program for homeowners' associations and their members would be funded by moneys and filing fees generated by the arbitration and mediation proceedings.

*Proposed Changes*

This bill amends s. 720.311, F.S., to provide:

- That all references to mediation be changed to "presuit" mediation;
- That disputes subject to presuit mediation do not include the collection of any assessments, fines, or other financial obligations, including attorney's fees and costs, or any action to enforce a prior mediation settlement;
- That the presuit mediation requirements of s. 720.311, F.S., do not apply to any dispute where emergency relief is required;
- A form for the written offer to participate in presuit mediation titled "Statutory Offer to Participate in Presuit Mediation" that must be substantially followed by the aggrieved party and which is served on the responding party. The form provides that the party may waive presuit mediation so that this matter may proceed directly to court;
- That service of the statutory offer is effected by sending the statutory form, or a letter that conforms substantially to the statutory form, by certified mail, with an additional copy being sent via regular first-class mail, to the address of the responding party as it appears on the books and records of the association;
- That dispute resolution to resolve disputes between associations and a parcel owner is no longer within the jurisdiction of the Department of Business and Professional Regulation;
- That the responding party will have 20 days from the date the offer is mailed to serve a response in writing. The response is to be served by certified mail, with an additional copy being sent by regular first-class mail to the address shown on the offer;
- That the mediator may require advance payment of fees and costs. This bill removes the $200 filing fee requirement and other language providing for the fees for a DBPR mediator.
- That failure of either party to appear for mediation, respond to the offer, agree on a mediator, or pay the fees and costs will entitle the other party to seek an award of the costs and fees associated with mediation;
- That if presuit mediation cannot be conducted within 90 days after the offer to participate, then an impasse will be deemed unless both parties agree to extend the deadline;
- That any issue or dispute that is not resolved at presuit mediation, the prevailing party in any subsequent arbitration or litigation proceeding shall be entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process; and
- That DBPR is no longer responsible for certification programs for mediators or education programs for homeowners' associations.

Beach Access

*Proposed Changes*

The bill creates s. 718.106(5), F.S., to prohibit local ordinances or regulations that limit the ability of unit owners or a condominium association to allow access by certain persons such as unit owners and their guests via their units or common areas to beaches that adjoin the condominium.

Equity Facilities Clubs

*Proposed Changes*

The bill amends s. 719.103, F.S., to define the term "equity facilities club". It also amends s. 719.507, F.S., to require that laws, ordinances, and regulations governing buildings and improvements on equity facilities clubs be equally applicable to all such buildings and improvements.

C. SECTION DIRECTORY:

Section 1 creates s. 712.11, F.S., to provide that homeowners' associations may use procedures established in ss. 720.403, F.S. - 720.407, F.S., to revive covenants that have lapsed under the terms of Chapter 712, F.S.

Section 2 amends s. 718.106, F.S., regarding limitations on beach access permitted by condominium unit owners or associations.

Section 3 amends s. 718.110, F.S., providing for certain procedures for amending declarations of condominium, articles of incorporation, or bylaws where the declarations of condominium, articles of incorporation, or bylaws requires the association to obtain consent and joinder of mortgagees.

Section 4 amends s. 718.112, F.S., to revise the date after which local jurisdictions may require completion of retrofitting with sprinklers of common areas of certain condominiums.

Section 5 amends s. 718.114, F.S., limiting the ability of a condominium association to acquire leaseholds, memberships, or other possessory or use interests.

Section 6 amends s. 718.404, F.S., to provide that subsections (1) and (2) are intended to be applied retroactively as a remedial measure.

Section 7 amends s. 719.103, F.S., to create the definition of "equity facilities club".

Section 8 amends s. 719.507, F.S., regarding the application of certain building or zoning laws, ordinances, and regulations to equity facilities clubs.

Section 9 amends s. 720.302, F.S., to provide an exception to the current law that ch. 720, F.S., does not apply to any association under ch. 718, F.S., ch. 719, F.S., or ch. 721, F.S.

Section 10 amends s. 720.303, F.S., addressing open meetings requirements, the provision of information by the homeowners' association to prospective buyers or sellers, the provision of financial reports, and the requirements for association budgets.

Section 11 repeals s. 720.303(2), F.S.

Section 12 creates s. 720.3035, F.S., relating to architectural control covenants and parcel owner improvements.

Section 13 amends s. 720.305, F.S., to provide that a member who prevails in an action against an association may recover additional amounts for his or her member share of the assessment that he or she will have to pay for the association's legal fees and costs.

Section 14 amends s. 720.306, F.S., revising provisions pertaining to meetings of members and amendments providing that merger or consolidation of associations is not considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel.

Section 15 amends s. 720.307, F.S., to require that at the time the members are entitled to elect at least a majority of the board of directors, the developer must deliver the financial records of the association.

Section 16 amends s. 720.308, F.S., to establish guarantees of common expenses if a guarantee is not included in the purchase contract or declaration.

Section 17 amends s. 720.311, F.S., revising the dispute resolution provisions for disputes between an association and a parcel owner.

Section 18 provides an effective date of July 1, 2006, except as otherwise expressly provided in this bill.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The Department of Business and Professional Regulation (DBPR) estimates that this bill will result in a reduction of $126,018 in mediation filing fees and expenses received by the DBPR. It will also result in a reduction of $9,199 in service charges provided to General Revenue.[14]

2. Expenditures:

   The Department of Business and Professional Regulation will experience decreased workload as a result of no longer being required to perform homeowner association mediations. The department states, however, that it did not receive additional FTE's to perform homeowners' association mediations when the DBPR was originally assigned those responsibilities in FY 2004-05. The staff who have been conducting homeowners' association mediations also performs condominium mediations and the DBPR states they would return to those responsibilities full-time.

   According to the Legislative Analysis Form provided by DBPR, the bill's changes regarding mediation may result in increased court filings. During the roughly 12-month period from October 1, 2004 through November 22, 2005, the DBPR states that it received 1,007 petitions for mediation. Approximately 560 or 56% of these were settled and did not result in court filings.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

[14] The fiscal impact on state government was provided by Matilde Phillips of the Department of Business and Professional Regulation on April 3, 2006.

2. Other:

Article I, Section 10 of the Florida Constitution provides: "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."[15] "A statute contravenes the constitutional prohibition against impairment of contracts when it has the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts."[16] [17]

The Supreme Court of Florida in *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979) held that laws impairing contracts can be unconstitutional if they unreasonably and unnecessarily impair the contractual rights of citizens.[18] The *Pomponio* Court indicated that the "well-accepted principle in this state is that virtually no degree of contract impairment is tolerable in this state." *Pomponio*, 378 So. 2d at 780. When seeking to determine what level of impairment is constitutionally permissible, a court "must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy." *Id.*

In other words, "[t]his method requires a balancing of a person's interest not to have his contracts impaired with the state's interest in exercising its legitimate police power." *U.S. Fidelity and Guar. Co. v. Department of Ins.*, 453 So. 2d 1355, 1360-61 (1984). What should be reviewed when considering this balancing test?

> [T]he United States Supreme Court recently outlined the main factors to be considered in applying this balancing test. The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. Total destruction of contractual expectations is not necessary for a finding of substantial impairment. On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. The Court long ago observed: One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation such as the remedying of a broad and general social or economic problem. Furthermore, since *Blaisdell*, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation. One legitimate state interest is the elimination of unforeseen windfall profits. The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.
> Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption. Unless the State itself is a contracting party, as is customary in reviewing economic and social regulation, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.

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[15] Article 1, Section 10(1) of the U.S. Constitution provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . . "

[16] 10a Fla. Jur. s. 414, Constitutional Law.

[17] The term impair is defined as "to make worse; to diminish in quantity, value, excellence, or strength; or to lessen in power or weaken." 10a Fla. Jur. s. 414, Constitutional Law.

[18] The Florida Supreme Court has adopted the method of analysis from the United States Supreme Court in cases involving the contract clause. *Pomponio*, 378 So. 2d at 780.

*U.S. Fidelity and Guar. Co.*, 453 So.2d at 1360-61 (Fla. 1984) (internal citations and quotations omitted).

This bill amends s. 718.110, F.S., by providing certain notice requirements that the association and the unit owners must provide to mortgagees if the governing documents are amended and the mortgage was entered into before the effective date of this bill. This bill also provides that a mortgagee who does not respond to the notice is deemed to have consented to the amendment. Unit owners and mortgagees enter into a contractual relationship when they agree to the terms of a mortgage. Unit owners and a condominium association enter into a contractual relationship when the unit owner buys the condominium, thus agreeing to the rules and bylaws of the association. Both contractual relationships are entered into based on the law in place at that time. By changing the law as it relates to amending condominium documents and providing that the new laws will apply to preexisting contracts, this bill could possibly be a violation of the Contract Clause of the Florida Constitution.

There could also be some possible constitutional problems with the changes made in this bill to subsections (1) and (2) of s. 718.404, F.S. This bill amends this section to make these subsections apply retroactively. This could lead to contract clause violations if it were found to impair existing contracts.

B. RULE-MAKING AUTHORITY:

None. However, the bill may require the repeal of Ch. 61B-82, F.A.C., containing the mediation rules of procedure.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 25, 2006, the Civil Justice Committee adopted 9 amendments to this bill. The amendments made the following revisions to the bill:

- Provides for the use of accounting principles as adopted by the Florida Board of Accountancy.
- Provides that the annual budget of homeowners' associations include the annual operating expenses and reserve accounts for capital expenditures and deferred maintenance.
- Provides that complete financial records of homeowners' associations be included with the documents that the developer must deliver at the time the members of the association are entitled to elect at least a majority of the board of directors.
- Provides for guarantees of common expenses when a guarantee is not included in the purchase contract or declaration. The amendment provides for the guarantee time period, maximum level of assessments, cash funding requirements during the guarantee, calculations of guarantor's final obligation, and for funding of expenses incurred in the production of non-assessment revenues.
- Provides that any member who prevails against an association and is awarded attorney's fees may also be awarded an amount sufficient to cover the member's pro-rata portion of those fees.
- Provides that in s. 718.404, F.S., regarding mixed-use condominiums, the following provisions are intended to apply retroactively as a remedial measure: (1) In mixed-use condominiums, the commercial unit owner cannot veto condominium documents; and (2) Where there are 50% residential units, the residential owners are entitled to vote for a majority of the seats on the board of administration.
- Removes section 8 of the bill regarding requirements for proposed revived declarations and other governing documents.
- Removes the phrase "not for profit" from s. 720.302(5), F.S., regarding the purpose and scope of ch. 720, F.S., so that it is in conformity with other revisions in the bill.

- Changes the phrase "100 members" to the more correct "100 parcels"[19] in s. 720.303(2)(c)1., F.S.

The bill was then reported favorably with a committee substitute.

On April 4, 2006, the Judiciary Appropriations Committee adopted a strike-all amendment. This amendment:

- Revises s. 718.110, F.S., regarding mortgagee consent to certain amendments to declarations, articles of incorporation, or bylaws of condominium associations.
- Revises the date after which local authorities having jurisdiction may require completion of retrofitting of common areas of a certain condominiums with a sprinkler system to the end of 2025.
- Defines the term "equity facilities club" and requires that laws, ordinances, and regulations governing buildings and improvements on equity facilities clubs be equally applicable to such buildings and improvements.
- Creates s. 718.106, F.S., to prohibit local ordinances or regulations that limit the access of certain persons such as unit owners or their guests via their units or common areas to beaches that adjoin condominiums.
- Creates s. 720.3035, F.S., governing architectural control decisions by a homeowners' association.
- Revises s. 720.303, F.S., regarding homeowners' association budgets.

The bill was then reported favorably with a committee substitute.

[19] This change was necessary because the use of members could vary if you had several members per parcel or if every parcel only had one member. By using 100 parcels, there is a determined set number that will not vary.

A bill to be entitled

An act relating to community associations; creating s. 712.11, F.S.; providing for the revival of certain covenants that have lapsed; amending s. 718.106, F.S.; prohibiting local governments from limiting the access of certain persons to beaches adjacent to or adjoining condominium property; amending s. 718.110, F.S.; revising provisions relating to the amendment of declarations; providing legislative findings and a finding of compelling state interest; providing criteria for consent to an amendment; requiring notice regarding proposed amendments to mortgagees; providing criteria for notification; providing for voiding certain amendments; amending s. 718.112, F.S.; revising the implementation date for retrofitting of common areas with a sprinkler system; amending s. 718.114, F.S.; providing that certain leaseholds, memberships, or other possessory or use interests shall be considered a material alteration or substantial addition to certain real property; amending s. 718.404, F.S.; providing retroactive application of provisions relating to mixed-use condominiums; amending s. 719.103, F.S.; providing a definition; amending s. 719.507, F.S.; prohibiting laws, ordinances, or regulations that apply only to improvements that are or may be subjected to an equity club form of ownership; amending s. 720.302, F.S.; revising governing provisions relating to corporations that operate residential

homeowners' associations; amending s. 720.303, F.S.; revising application to include certain meetings; requiring the association to provide certain information to prospective purchasers or lienholders; authorizing the association to charge a reasonable fee for providing certain information; requiring the budget to provide for annual operating expenses; authorizing the budget to include reserve accounts for capital expenditures and deferred maintenance; providing a formula for calculating the amount to be reserved; authorizing the association to adjust replacement reserve assessments annually; authorizing the developer to vote to waive the reserves or reduce the funding of reserves for a certain period; revising provisions relating to financial reporting; revising time periods in which the association must complete its reporting; repealing s. 720.303(2), F.S., as amended, relating to board meetings, to remove conflicting versions of that subsection; creating s. 720.3035, F.S.; providing for architectural control covenants and parcel owner improvements; authorizing the review and approval of plans and specifications; providing limitations; providing rights and privileges for parcel owners as set forth in the declaration of covenants; amending s. 720.305, F.S.; providing that, where a member is entitled to collect attorney's fees against the association, the member may also recover additional amounts as determined by the court; amending s. 720.306, F.S.; providing that certain

mergers or consolidations of an association shall not be considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel; amending s. 720.307, F.S.; requiring developers to deliver financial records to the board in any transition of association control to members; requiring certain information to be included in the records and for the records to be prepared in a specified manner; amending s. 720.308, F.S.; providing circumstances under which a guarantee of common expenses shall be effective; providing for approval of the guarantee by association members; providing for a guarantee period and extension thereof; requiring the stated dollar amount of the guarantee to be an exact dollar amount for each parcel identified in the declaration; providing payments required from the guarantor to be determined in a certain manner; providing a formula to determine the guarantor's total financial obligation to the association; providing that certain expenses incurred in the production of certain revenues shall not be included in the operating expenses; amending s. 720.311, F.S.; revising provisions relating to dispute resolution; providing that the filing of any petition for arbitration or the serving of an offer for presuit mediation shall toll the applicable statute of limitations; providing that certain disputes between an association and a parcel owner shall be subject to presuit mediation; revising provisions to conform; providing that

temporary injunctive relief may be sought in certain disputes subject to presuit mediation; authorizing the court to refer the parties to mediation under certain circumstances; requiring the aggrieved party to serve on the responding party a written offer to participate in presuit mediation; providing a form for such offer; providing that service of the offer is effected by the sending of such an offer in a certain manner; providing that the prevailing party in any subsequent arbitration or litigation proceedings is entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process; requiring the mediator or arbitrator to meet certain certification requirements; removing a requirement relating to development of an education program to increase awareness of the operation of homeowners' associations and the use of alternative dispute resolution techniques; providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 712.11, Florida Statutes, is created to read:

712.11 Covenant revitalization.--A homeowners' association not otherwise subject to chapter 720 may use the procedures set forth in ss. 720.403-720.407 to revive covenants that have lapsed under the terms of this chapter.

Section 2. Subsection (5) is added to section 718.106, Florida Statutes, to read:

718.106 Condominium parcels; appurtenances; possession and enjoyment.--

(5) A local government may not prohibit condominium unit owners or an association from permitting guests, licensees, or invitees access to a public beach adjacent to or adjoining the condominium property.

Section 3. Effective October 1, 2006, subsection (11) of section 718.110, Florida Statutes, is amended to read:

718.110 Amendment of declaration; correction of error or omission in declaration by circuit court.--

(11) The Legislature finds that the procurement of mortgagee consent to amendments that do not affect the rights or interests of mortgagees is an unreasonable and substantial logistical and financial burden on the unit owners and that there is a compelling state interest in enabling the members of a condominium association to approve amendments to the condominium documents through legal means. Accordingly, and notwithstanding any provision to the contrary contained in this section:

(a) As to any mortgage recorded on or after October 1, 2006, any provision in the declaration, articles of incorporation, or bylaws that requires ~~recorded after April 1, 1992, may not require~~ the consent or joinder of some or all mortgagees of units or any other portion of the condominium property to or in amendments to the declaration, articles of

incorporation, or bylaws or for any other matter shall be enforceable only as to the following matters: ~~unless the requirement is limited to amendments materially affecting the rights or interests of the mortgagees, or as otherwise required by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, and unless the requirement provides that such consent may not be unreasonably withheld. It shall be presumed that, except as to~~

1. Those matters described in subsections (4) and (8).~~,~~

2. Amendments to the declaration, articles of incorporation, or bylaws that adversely affect the priority of the mortgagee's lien or the mortgagee's rights to foreclose its lien or that otherwise materially affect the rights and interests of the mortgagees.

(b) As to mortgages recorded before October 1, 2006, any existing provisions in the declaration, articles of incorporation, or bylaws requiring mortgagee consent shall be enforceable.

(c) In securing consent or joinder, the association shall be entitled to rely upon the public records to identify the holders of outstanding mortgages. The association may use the address provided in the original recorded mortgage document, unless there is a different address for the holder of the mortgage in a recorded assignment or modification of the mortgage, which recorded assignment or modification must reference the official records book and page on which the original mortgage was recorded. Once the association has

identified the recorded mortgages of record, the association shall, in writing, request of each unit owner whose unit is encumbered by a mortgage of record any information the owner has in his or her possession regarding the name and address of the person to whom mortgage payments are currently being made. Notice shall be sent to such person if the address provided in the original recorded mortgage document is different from the name and address of the mortgagee or assignee of the mortgage as shown by the public record. The association shall be deemed to have complied with this requirement by making the written request of the unit owners required under this paragraph. Any notices required to be sent to the mortgagees under this paragraph shall be sent to all available addresses provided to the association.

(d) Any notice to the mortgagees required under paragraph (c) may be sent by a method that establishes proof of delivery, and any mortgagee who fails to respond within 60 days after the date of mailing shall be deemed to have consented to the amendment.

(e) For those amendments requiring mortgagee consent on or after October 1, 2006, ~~do not materially affect the rights or interests of mortgagees.~~ in the event mortgagee consent is provided other than by properly recorded joinder, such consent shall be evidenced by affidavit of the association recorded in the public records of the county where the declaration is recorded. Any amendment adopted without the required consent of a mortgagee shall be voidable only by a mortgagee who was

entitled to notice and an opportunity to consent. An action to void an amendment shall be subject to the statute of limitations beginning 5 years from the date of discovery as to the amendments described in subparagraphs (a)1. and 2. and 5 years from the date of recordation of the certificate of amendment for all other amendments. This provision shall apply to all mortgages, regardless of the date of recordation of the mortgage.

Section 4. Paragraph (l) of subsection (2) of section 718.112, Florida Statutes, is amended to read:

718.112 Bylaws.--

(2) REQUIRED PROVISIONS.--The bylaws shall provide for the following and, if they do not do so, shall be deemed to include the following:

(l) Certificate of compliance.--There shall be a provision that a certificate of compliance from a licensed electrical contractor or electrician may be accepted by the association's board as evidence of compliance of the condominium units with the applicable fire and life safety code. Notwithstanding the provisions of chapter 633 or of any other code, statute, ordinance, administrative rule, or regulation, or any interpretation of the foregoing, an association, condominium, or unit owner is not obligated to retrofit the common elements or units of a residential condominium with a fire sprinkler system or other engineered lifesafety system in a building that has been certified for occupancy by the applicable governmental entity, if the unit owners have voted to forego such

retrofitting and engineered lifesafety system by the affirmative vote of two-thirds of all voting interests in the affected condominium. However, a condominium association may not vote to forego the retrofitting with a fire sprinkler system of common areas in a high-rise building. For purposes of this subsection, the term "high-rise building" means a building that is greater than 75 feet in height where the building height is measured from the lowest level of fire department access to the floor of the highest occupiable story. For purposes of this subsection, the term "common areas" means any enclosed hallway, corridor, lobby, stairwell, or entryway. In no event shall the local authority having jurisdiction require completion of retrofitting of common areas with a sprinkler system before the end of 2025 ~~2014~~.

1. A vote to forego retrofitting may be obtained by limited proxy or by a ballot personally cast at a duly called membership meeting, or by execution of a written consent by the member, and shall be effective upon the recording of a certificate attesting to such vote in the public records of the county where the condominium is located. The association shall mail, hand deliver, or electronically transmit to each unit owner written notice at least 14 days prior to such membership meeting in which the vote to forego retrofitting of the required fire sprinkler system is to take place. Within 30 days after the association's opt-out vote, notice of the results of the opt-out vote shall be mailed, hand delivered, or electronically transmitted to all unit owners. Evidence of compliance with this

30-day notice shall be made by an affidavit executed by the person providing the notice and filed among the official records of the association. After such notice is provided to each owner, a copy of such notice shall be provided by the current owner to a new owner prior to closing and shall be provided by a unit owner to a renter prior to signing a lease.

2. As part of the information collected annually from condominiums, the division shall require condominium associations to report the membership vote and recording of a certificate under this subsection and, if retrofitting has been undertaken, the per-unit cost of such work. The division shall annually report to the Division of State Fire Marshal of the Department of Financial Services the number of condominiums that have elected to forego retrofitting.

Section 5. Section 718.114, Florida Statutes, is amended to read:

718.114 Association powers.--An association has the power to enter into agreements, to acquire leaseholds, memberships, and other possessory or use interests in lands or facilities such as country clubs, golf courses, marinas, and other recreational facilities. It has this power whether or not the lands or facilities are contiguous to the lands of the condominium, if they are intended to provide enjoyment, recreation, or other use or benefit to the unit owners. All of these leaseholds, memberships, and other possessory or use interests existing or created at the time of recording the declaration must be stated and fully described in the

declaration. Subsequent to the recording of the declaration, agreements acquiring these leaseholds, memberships, or other possessory or use interests not entered into within 12 months following the recording of the declaration shall be considered a material alteration or substantial addition to the real property that is association property, and the association may not acquire or enter into agreements acquiring these leaseholds, memberships, or other possessory or use interests except as authorized by the declaration as provided in s. 718.113. The declaration may provide that the rental, membership fees, operations, replacements, and other expenses are common expenses and may impose covenants and restrictions concerning their use and may contain other provisions not inconsistent with this chapter. A condominium association may conduct bingo games as provided in s. 849.0931.

Section 6. Subsections (1) and (2) of section 718.404, Florida Statutes, are amended to read:

718.404 Mixed-use condominiums.--When a condominium consists of both residential and commercial units, the following provisions shall apply:

(1) The condominium documents shall not provide that the owner of any commercial unit shall have the authority to veto amendments to the declaration, articles of incorporation, bylaws, or rules or regulations of the association. This subsection shall apply retroactively as a remedial measure.

(2) Subject to s. 718.301, where the number of residential units in the condominium equals or exceeds 50 percent of the

total units operated by the association, owners of the residential units shall be entitled to vote for a majority of the seats on the board of administration. This subsection shall apply retroactively as a remedial measure.

Section 7. Subsections (18) through (27) of section 719.103, Florida Statutes, are renumbered as subsections (19) through (28), respectively, and a new subsection (18) is added to that section to read:

719.103 Definitions.--As used in this chapter:

(18) "Equity facilities club" means a club comprised of recreational facilities in which proprietary membership interests are sold to individuals, which membership interests entitle the individuals to use certain physical facilities owned by the equity club. Such physical facilities do not include a residential unit or accommodation. For purposes of this definition, the term "accommodation" shall include, but is not limited to, any apartment, residential cooperative unit, residential condominium unit, cabin, lodge, hotel or motel room, or any other accommodation designed for overnight occupancy for one or more individuals.

Section 8. Section 719.507, Florida Statutes, is amended to read:

719.507 Zoning and building laws, ordinances, and regulations.--All laws, ordinances, and regulations concerning buildings or zoning shall be construed and applied with reference to the nature and use of such property, without regard to the form of ownership. No law, ordinance, or regulation shall

establish any requirement concerning the use, location, placement, or construction of buildings or other improvements which are, or may thereafter be, subjected to the cooperative or equity facilities club form of ownership, unless such requirement shall be equally applicable to all buildings and improvements of the same kind not then, or thereafter to be, subjected to the cooperative or equity facilities club form of ownership. This section does not apply if the owner in fee of any land enters into and records a covenant that existing improvements or improvements to be constructed shall not be converted to the cooperative form of residential ownership prior to 5 years after the later of the date of the covenant or completion date of the improvements. Such covenant shall be entered into with the governing body of the municipality in which the land is located or, if the land is not located in a municipality, with the governing body of the county in which the land is located.

Section 9. Subsections (4) and (5) of section 720.302, Florida Statutes, are amended to read:

720.302 Purposes, scope, and application.--

(4) This chapter does not apply to any association that is subject to regulation under chapter 718, chapter 719, or chapter 721~~,~~ or to any nonmandatory association formed under chapter 723, except to the extent that a provision of chapter 718, chapter 719, or chapter 721 is expressly incorporated into this chapter for the purpose of regulating homeowners' associations.

(5) Unless expressly stated to the contrary, corporations ~~not for profit~~ that operate residential homeowners' associations in this state shall be governed by and subject to chapter 607, if the association was incorporated under that chapter, or to chapter 617, if the association was incorporated under that chapter, and this chapter. This subsection is intended to clarify existing law.

Section 10. Paragraph (a) of subsection (2), subsection (6), and subsection (7) of section 720.303, Florida Statutes, as amended by section 18 of chapter 2004-345 and section 135 of chapter 2005-2, Laws of Florida, are amended, and paragraph (d) is added to subsection (5) of that section, to read:

720.303 Association powers and duties; meetings of board; official records; budgets; financial reporting; association funds; recalls.--

(2) BOARD MEETINGS.--

(a) A meeting of the board of directors of an association occurs whenever a quorum of the board gathers to conduct association business. All meetings of the board must be open to all members except for meetings between the board and its attorney with respect to proposed or pending litigation where the contents of the discussion would otherwise be governed by the attorney-client privilege. The provisions of this subsection shall also apply to the meetings of any committee or other similar body when a final decision will be made regarding the expenditure of association funds and to meetings of any body vested with the power to approve or disapprove architectural

decisions with respect to a specific parcel of residential property owned by a member of the community.

(5) INSPECTION AND COPYING OF RECORDS.--The official records shall be maintained within the state and must be open to inspection and available for photocopying by members or their authorized agents at reasonable times and places within 10 business days after receipt of a written request for access. This subsection may be complied with by having a copy of the official records available for inspection or copying in the community. If the association has a photocopy machine available where the records are maintained, it must provide parcel owners with copies on request during the inspection if the entire request is limited to no more than 25 pages.

(d) The association or its authorized agent is not required to provide a prospective purchaser or lienholder with information about the residential subdivision or the association other than information or documents required by this chapter to be made available or disclosed. The association or its authorized agent may charge a reasonable fee to the prospective purchaser or lienholder or the current parcel owner or member for providing good faith responses to requests for information by or on behalf of a prospective purchaser or lienholder, other than that required by law, if the fee does not exceed $150 plus the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the response.

(6) BUDGETS.--

(a) The association shall prepare an annual budget that sets out the annual operating expenses. The budget must reflect the estimated revenues and expenses for that year and the estimated surplus or deficit as of the end of the current year. The budget must set out separately all fees or charges paid for by the association for recreational amenities, whether owned by the association, the developer, or another person. The association shall provide each member with a copy of the annual budget or a written notice that a copy of the budget is available upon request at no charge to the member. The copy must be provided to the member within the time limits set forth in subsection (5).

(b) In addition to annual operating expenses, the budget may include reserve accounts for capital expenditures and deferred maintenance for which the association is responsible to the extent that the governing documents do not limit increases in assessments, including reserves. If the budget of the association includes reserve accounts, such reserves shall be determined, maintained, and waived in the manner provided in this subsection. Once an association provides for reserve accounts in the budget, the association shall thereafter determine, maintain, and waive reserves in compliance with the provisions of this subsection.

(c) If the budget of the association does not provide for reserve accounts governed by this subsection and the association is responsible for the repair and maintenance of capital improvements that may result in a special assessment if reserves

are not provided, each financial report for the preceding fiscal year required by subsection (7) shall contain the following statement in conspicuous type: THE BUDGET OF THE ASSOCIATION DOES NOT PROVIDE FOR RESERVE ACCOUNTS FOR CAPITAL EXPENDITURES AND DEFERRED MAINTENANCE THAT MAY RESULT IN SPECIAL ASSESSMENTS. OWNERS MAY ELECT TO PROVIDE FOR RESERVE ACCOUNTS PURSUANT TO THE PROVISIONS OF SECTION 720.303(6), FLORIDA STATUTES, UPON THE APPROVAL OF NOT LESS THAN A MAJORITY OF THE TOTAL VOTING INTERESTS OF THE ASSOCIATION.

(d) An association shall be deemed to have provided for reserve accounts when reserve accounts have been initially established by the developer or when the membership of the association affirmatively elects to provide for reserves. If reserve accounts are not initially provided for by the developer, the membership of the association may elect to do so upon the affirmative approval of not less than a majority of the total voting interests of the association. Such approval may be attained by vote of the members at a duly called meeting of the membership or upon a written consent executed by not less than a majority of the total voting interests in the community. The approval action of the membership shall state that reserve accounts shall be provided for in the budget and designate the components for which the reserve accounts are to be established. Upon approval by the membership, the board of directors shall provide for the required reserve accounts for inclusion in the budget in the next fiscal year following the approval and in each year thereafter. Once established as provided in this

subsection, the reserve accounts shall be funded or maintained or shall have their funding waived in the manner provided in paragraph (f).

(e) The amount to be reserved in any account established shall be computed by means of a formula that is based upon estimated remaining useful life and estimated replacement cost or deferred maintenance expense of each reserve item. The association may adjust replacement reserve assessments annually to take into account any changes in estimates of cost or useful life of a reserve item.

(f) Once a reserve account or reserve accounts are established, the membership of the association, upon a majority vote at a meeting at which a quorum is present, may provide for no reserves or less reserves than required by this section. If a meeting of the unit owners has been called to determine whether to waive or reduce the funding of reserves and no such result is achieved or a quorum is not present, the reserves as included in the budget shall go into effect. After the turnover, the developer may vote its voting interest to waive or reduce the funding of reserves. Any vote taken pursuant to this subsection to waive or reduce reserves shall be applicable only to one budget year.

(g) Funding formulas for reserves authorized by this section shall be based on either a separate analysis of each of the required assets or a pooled analysis of two or more of the required assets.

1. If the association maintains separate reserve accounts for each of the required assets, the amount of the contribution to each reserve account shall be the sum of the following two calculations:

a. The total amount necessary, if any, to bring a negative component balance to zero.

b. The total estimated deferred maintenance expense or estimated replacement cost of the reserve component less the estimated balance of the reserve component as of the beginning of the period for which the budget will be in effect. The remainder, if greater than zero, shall be divided by the estimated remaining useful life of the component.

The formula may be adjusted each year for changes in estimates and deferred maintenance performed during the year and may include factors such as inflation and earnings on invested funds.

2. If the association maintains a pooled account of two or more of the required reserve assets, the amount of the contribution to the pooled reserve account as disclosed on the proposed budget shall not be less than that required to ensure that the balance on hand at the beginning of the period for which the budget will go into effect plus the projected annual cash inflows over the remaining estimated useful life of all of the assets that make up the reserve pool are equal to or greater than the projected annual cash outflows over the remaining estimated useful lives of all of the assets that make up the

reserve pool, based on the current reserve analysis. The projected annual cash inflows may include estimated earnings from investment of principal. The reserve funding formula shall not include any type of balloon payments.

(h) Reserve funds and any interest accruing thereon shall remain in the reserve account or accounts and shall be used only for authorized reserve expenditures unless their use for other purposes is approved in advance by a majority vote at a meeting at which a quorum is present. Prior to turnover of control of an association by a developer to parcel owners, the developer-controlled association shall not vote to use reserves for purposes other than those for which they were intended without the approval of a majority of all nondeveloper voting interests voting in person or by limited proxy at a duly called meeting of the association.

(7) FINANCIAL REPORTING.--Within 90 days after the end of the fiscal year, or annually on the date provided in the bylaws, the association shall prepare and complete, or contract with a third party for the preparation and completion of, a financial report for the preceding fiscal year. Within 21 days after the final financial report is completed by the association or received from the third party, but not later than 120 days after the end of the fiscal year or other date as provided in the bylaws, the association shall ~~prepare an annual financial report within 60 days after the close of the fiscal year. The association shall~~, within the time limits set forth in subsection (5), provide each member with a copy of the annual

financial report or a written notice that a copy of the financial report is available upon request at no charge to the member. Financial reports shall be prepared as follows:

(a) An association that meets the criteria of this paragraph shall prepare or cause to be prepared a complete set of financial statements in accordance with generally accepted accounting principles as adopted by the Board of Accountancy. The financial statements shall be based upon the association's total annual revenues, as follows:

1. An association with total annual revenues of $100,000 or more, but less than $200,000, shall prepare compiled financial statements.

2. An association with total annual revenues of at least $200,000, but less than $400,000, shall prepare reviewed financial statements.

3. An association with total annual revenues of $400,000 or more shall prepare audited financial statements.

(b)1. An association with total annual revenues of less than $100,000 shall prepare a report of cash receipts and expenditures.

2. An association in a community of fewer than 50 parcels, regardless of the association's annual revenues, may prepare a report of cash receipts and expenditures in lieu of financial statements required by paragraph (a) unless the governing documents provide otherwise.

3. A report of cash receipts and disbursement must disclose the amount of receipts by accounts and receipt

classifications and the amount of expenses by accounts and expense classifications, including, but not limited to, the following, as applicable: costs for security, professional, and management fees and expenses; taxes; costs for recreation facilities; expenses for refuse collection and utility services; expenses for lawn care; costs for building maintenance and repair; insurance costs; administration and salary expenses; and reserves if maintained by the association.

(c) If 20 percent of the parcel owners petition the board for a level of financial reporting higher than that required by this section, the association shall duly notice and hold a meeting of members within 30 days of receipt of the petition for the purpose of voting on raising the level of reporting for that fiscal year. Upon approval of a majority of the total voting interests of the parcel owners, the association shall prepare or cause to be prepared, shall amend the budget or adopt a special assessment to pay for the financial report regardless of any provision to the contrary in the governing documents, and shall provide within 90 days of the meeting or the end of the fiscal year, whichever occurs later:

1. Compiled, reviewed, or audited financial statements, if the association is otherwise required to prepare a report of cash receipts and expenditures;

2. Reviewed or audited financial statements, if the association is otherwise required to prepare compiled financial statements; or

3. Audited financial statements if the association is otherwise required to prepare reviewed financial statements.

(d) If approved by a majority of the voting interests present at a properly called meeting of the association, an association may prepare or cause to be prepared:

1. A report of cash receipts and expenditures in lieu of a compiled, reviewed, or audited financial statement;

2. A report of cash receipts and expenditures or a compiled financial statement in lieu of a reviewed or audited financial statement; or

3. A report of cash receipts and expenditures, a compiled financial statement, or a reviewed financial statement in lieu of an audited financial statement.

Section 11. Subsection (2) of section 720.303, Florida Statutes, as amended by section 2 of chapter 2004-345 and section 15 of chapter 2004-353, Laws of Florida, is repealed.

Section 12. Section 720.3035, Florida Statutes, is created to read:

720.3035 Architectural control covenants; parcel owner improvements; rights and privileges.--

(1) The authority of an association or any architectural, construction improvement, or other such similar committee of an association to review and approve plans and specifications for the location, size, type, or appearance of any structure or other improvement on a parcel, or to enforce standards for the external appearance of any structure or improvement located on a parcel, shall only be permitted to the extent that the authority

is specifically stated or reasonably inferred as to such location, size, type, or appearance in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.

(2) If the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants provides options for the use of material, the size of the structure or improvement, the design of the structure or improvement, or the location of the structure or improvement on the parcel, neither the association nor any architectural, construction improvement, or other such similar committee of the association shall restrict the right of a parcel owner to select from the options provided in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.

(3) Unless otherwise specifically stated in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, each parcel shall be deemed to have only one front for purposes of determining the required front setback even if the parcel is bounded by a roadway or other easement on more than one side. When the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants do not provide for specific setback limitations, the applicable county or municipal setback limitations shall apply, and neither the association nor any architectural, construction improvement, or other such similar committee of the association shall enforce or

attempt to enforce any setback limitation that is inconsistent with the applicable county or municipal standard or standards.

(4) Each parcel owner shall be entitled to the rights and privileges set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants concerning the architectural use of the parcel, and the construction of permitted structures and improvements on the parcel and such rights and privileges shall not be unreasonably infringed upon or impaired by the association or any architectural, construction improvement, or other such similar committee of the association. If the association or any architectural, construction improvement, or other such similar committee of the association should unreasonably, knowingly, and willfully infringe upon or impair the rights and privileges set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, the adversely affected parcel owner shall be entitled to recover damages caused by such infringement or impairment, including any costs and reasonable attorney's fees incurred in preserving or restoring the rights and privileges of the parcel owner set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.

(5) Neither the association nor any architectural, construction improvement, or other such similar committee of the association shall enforce any policy or restriction that is inconsistent with the rights and privileges of a parcel owner

set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, whether uniformly applied or not. Neither the association nor any architectural, construction improvement, or other such similar committee of the association may rely upon a policy or restriction that is inconsistent with the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, whether uniformly applied or not, in defense of any action taken in the name of or on behalf of the association against a parcel owner.

Section 13. Subsection (1) of section 720.305, Florida Statutes, is amended to read:

720.305 Obligations of members; remedies at law or in equity; levy of fines and suspension of use rights; failure to fill sufficient number of vacancies on board of directors to constitute a quorum; appointment of receiver upon petition of any member.--

(1) Each member and the member's tenants, guests, and invitees, and each association, are governed by, and must comply with, this chapter, the governing documents of the community, and the rules of the association. Actions at law or in equity, or both, to redress alleged failure or refusal to comply with these provisions may be brought by the association or by any member against:

(a) The association;

(b) A member;

(c) Any director or officer of an association who willfully and knowingly fails to comply with these provisions; and

(d) Any tenants, guests, or invitees occupying a parcel or using the common areas.

The prevailing party in any such litigation is entitled to recover reasonable attorney's fees and costs. A member prevailing in an action between the association and the member under this section, in addition to recovering his or her reasonable attorney's fees, may recover additional amounts as determined by the court to be necessary to reimburse the member for his or her share of assessments levied by the association to fund its expenses of the litigation. This relief does not exclude other remedies provided by law. This section does not deprive any person of any other available right or remedy.

Section 14. Paragraph (c) of subsection (1) of section 720.306, Florida Statutes, is amended to read:

720.306 Meetings of members; voting and election procedures; amendments.--

(1) QUORUM; AMENDMENTS.--

(c) Unless otherwise provided in the governing documents as originally recorded or permitted by this chapter or chapter 617, an amendment may not materially and adversely alter the proportionate voting interest appurtenant to a parcel or increase the proportion or percentage by which a parcel shares in the common expenses of the association unless the record

parcel owner and all record owners of liens on the parcels join in the execution of the amendment. For purposes of this section, a change in quorum requirements is not an alteration of voting interests. The merger or consolidation of one or more associations under a plan of merger or consolidation under chapter 607 or chapter 617 shall not be considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel.

Section 15. Paragraph (t) is added to subsection (3) of section 720.307, Florida Statutes, to read:

720.307 Transition of association control in a community.--With respect to homeowners' associations:

(3) At the time the members are entitled to elect at least a majority of the board of directors of the homeowners' association, the developer shall, at the developer's expense, within no more than 90 days deliver the following documents to the board:

(t) The financial records, including financial statements of the association, and source documents from the incorporation of the association through the date of turnover. The records shall be audited by an independent certified public accountant for the period from the incorporation of the association or from the period covered by the last audit, if an audit has been performed for each fiscal year since incorporation. All financial statements shall be prepared in accordance with generally accepted accounting principles and shall be audited in accordance with generally accepted auditing standards, as

prescribed by the Board of Accountancy, pursuant to chapter 473. The certified public accountant performing the audit shall examine to the extent necessary supporting documents and records, including the cash disbursements and related paid invoices to determine if expenditures were for association purposes and the billings, cash receipts, and related records of the association to determine that the developer was charged and paid the proper amounts of assessments. This paragraph applies to associations with a date of incorporation after December 31, 2006.

Section 16. Section 720.308, Florida Statutes, is amended to read:

720.308 Assessments and charges.--

(1) ASSESSMENTS.--For any community created after October 1, 1995, the governing documents must describe the manner in which expenses are shared and specify the member's proportional share thereof. Assessments levied pursuant to the annual budget or special assessment must be in the member's proportional share of expenses as described in the governing document, which share may be different among classes of parcels based upon the state of development thereof, levels of services received by the applicable members, or other relevant factors. While the developer is in control of the homeowners' association, it may be excused from payment of its share of the operating expenses and assessments related to its parcels for any period of time for which the developer has, in the declaration, obligated itself to pay any operating expenses incurred that exceed the

assessments receivable from other members and other income of the association. This section does not apply to an association, no matter when created, if the association is created in a community that is included in an effective development-of-regional-impact development order as of the effective date of this act, together with any approved modifications thereto.

(2) GUARANTEES OF COMMON EXPENSES.--

(a) Establishment of a guarantee.--If a guarantee of the assessments of parcel owners is not included in the purchase contracts or declaration, any agreement establishing a guarantee shall only be effective upon the approval of a majority of the voting interests of the members other than the developer. Approval shall be expressed at a meeting of the members voting in person or by limited proxy or by agreement in writing without a meeting if provided in the bylaws. Such guarantee shall meet the requirements of this section.

(b) Guarantee period.--The period of time for the guarantee shall be indicated by a specific beginning and ending date or event.

1. The ending date or event shall be the same for all of the members of an association, including members in different phases of the development.

2. The guarantee may provide for different intervals of time during a guarantee period with different dollar amounts for each such interval.

3. The guarantee may provide that after the initial stated period, the developer has an option to extend the guarantee for

one or more additional stated periods. The extension of a guarantee is limited to extending the ending date or event; therefore, the developer does not have the option of changing the level of assessments guaranteed.

(3) MAXIMUM LEVEL OF ASSESSMENTS.--The stated dollar amount of the guarantee shall be an exact dollar amount for each parcel identified in the declaration. Regardless of the stated dollar amount of the guarantee, assessments charged to a member shall not exceed the maximum obligation of the member based on the total amount of the adopted budget and the member's proportionate ownership share of the common elements.

(4) CASH FUNDING REQUIREMENTS DURING GUARANTEE.--The cash payments required from the guarantor during the guarantee period shall be determined as follows:

(a) If at any time during the guarantee period the funds collected from member assessments at the guaranteed level and other revenues collected by the association are not sufficient to provide payment, on a timely basis, of all assessments, including the full funding of the reserves unless properly waived, the guarantor shall advance sufficient cash to the association at the time such payments are due.

(b) Expenses incurred in the production of nonassessment revenues, not in excess of the nonassessment revenues, shall not be included in the assessments. If the expenses attributable to nonassessment revenues exceed nonassessment revenues, only the excess expenses must be funded by the guarantor. Interest earned on the investment of association funds may be used to pay the

income tax expense incurred as a result of the investment; such expense shall not be charged to the guarantor; and the net investment income shall be retained by the association. Each such nonassessment-revenue-generating activity shall be considered separately. Any portion of the parcel assessment that is budgeted for designated capital contributions of the association shall not be used to pay operating expenses.

(5) CALCULATION OF GUARANTOR'S FINAL OBLIGATION.--The guarantor's total financial obligation to the association at the end of the guarantee period shall be determined on the accrual basis using the following formula: the guarantor shall pay any deficits that exceed the guaranteed amount, less the total regular periodic assessments earned by the association from the members other than the guarantor during the guarantee period regardless of whether the actual level charged was less than the maximum guaranteed amount.

(6) EXPENSES.--Expenses incurred in the production of nonassessment revenues, not in excess of the nonassessment revenues, shall not be included in the operating expenses. If the expenses attributable to nonassessment revenues exceed nonassessment revenues, only the excess expenses must be funded by the guarantor. Interest earned on the investment of association funds may be used to pay the income tax expense incurred as a result of the investment; such expense shall not be charged to the guarantor; and the net investment income shall be retained by the association. Each such nonassessment-revenue-generating activity shall be considered separately. Any portion

of the parcel assessment that is budgeted for designated capital contributions of the association shall not be used to pay operating expenses.

Section 17. Section 720.311, Florida Statutes, is amended to read:

720.311 Dispute resolution.--

(1) The Legislature finds that alternative dispute resolution has made progress in reducing court dockets and trials and in offering a more efficient, cost-effective option to litigation. The filing of any petition for ~~mediation or~~ arbitration or the serving of an offer for presuit mediation as provided for in this section shall toll the applicable statute of limitations. Any recall dispute filed with the department pursuant to s. 720.303(10) shall be conducted by the department in accordance with the provisions of ss. 718.112(2)(j) and 718.1255 and the rules adopted by the division. In addition, the department shall conduct mandatory binding arbitration of election disputes between a member and an association pursuant to s. 718.1255 and rules adopted by the division. Neither election disputes nor recall disputes are eligible for presuit mediation; these disputes shall be arbitrated by the department. At the conclusion of the proceeding, the department shall charge the parties a fee in an amount adequate to cover all costs and expenses incurred by the department in conducting the proceeding. Initially, the petitioner shall remit a filing fee of at least $200 to the department. The fees paid to the department shall become a recoverable cost in the arbitration

proceeding, and the prevailing party in an arbitration proceeding shall recover its reasonable costs and attorney's fees in an amount found reasonable by the arbitrator. The department shall adopt rules to effectuate the purposes of this section.

(2)(a) Disputes between an association and a parcel owner regarding use of or changes to the parcel or the common areas and other covenant enforcement disputes, disputes regarding amendments to the association documents, disputes regarding meetings of the board and committees appointed by the board, membership meetings not including election meetings, and access to the official records of the association shall be the subject of an offer ~~filed with the department~~ for presuit ~~mandatory~~ mediation served by an aggrieved party before the dispute is filed in court. Presuit mediation proceedings must be conducted in accordance with the applicable Florida Rules of Civil Procedure, and these proceedings are privileged and confidential to the same extent as court-ordered mediation. Disputes subject to presuit mediation under this section shall not include the collection of any assessment, fine, or other financial obligation, including attorney's fees and costs, claimed to be due or any action to enforce a prior mediation settlement agreement between the parties. Also, in any dispute subject to presuit mediation under this section where emergency relief is required, a motion for temporary injunctive relief may be filed with the court without first complying with the presuit mediation requirements of this section. After any issues

regarding emergency or temporary relief are resolved, the court may either refer the parties to a mediation program administered by the courts or require mediation under this section. An arbitrator or judge may not consider any information or evidence arising from the presuit mediation proceeding except in a proceeding to impose sanctions for failure to attend a presuit mediation session or with the parties' agreement in a proceeding seeking to enforce the agreement. Persons who are not parties to the dispute may not attend the presuit mediation conference without the consent of all parties, except for counsel for the parties and a corporate representative designated by the association. When mediation is attended by a quorum of the board, such mediation is not a board meeting for purposes of notice and participation set forth in s. 720.303. An aggrieved party shall serve on the responding party a written offer to participate in presuit mediation in substantially the following form:

STATUTORY OFFER TO PARTICIPATE IN PRESUIT MEDIATION

The alleged aggrieved party, _____, hereby offers to _____, as the responding party, to enter into presuit mediation in connection with the following dispute, which by statute is of a type that is subject to presuit mediation:

(List specific nature of the dispute or disputes to be mediated and the authority supporting a finding of a violation as to each dispute.)

Pursuant to section 720.311, Florida Statutes, this offer to resolve the dispute through presuit mediation is required before a lawsuit can be filed concerning the dispute. Pursuant to the statute, the aggrieved party is hereby offering to engage in presuit mediation with a neutral third-party mediator in order to attempt to resolve this dispute without court action, and the aggrieved party demands that you likewise agree to this process. If you fail to agree to presuit mediation, or if you agree and later fail to follow through with your agreement to mediate, suit may be brought against you without further warning.

The process of mediation involves a supervised negotiation process in which a trained, neutral third-party mediator meets with both parties and assists them in exploring possible opportunities for resolving part or all of the dispute. The mediation process is a voluntary one. By agreeing to participate in presuit mediation, you are not bound in any way to change your position or to enter into any type of agreement. Furthermore, the mediator has no authority to make any decisions in this matter or to determine who is right

or wrong and merely acts as a facilitator to ensure that each party understands the position of the other party and that all reasonable settlement options are fully explored. All mediation communications are confidential under the Mediation Confidentiality and Privilege Act pursuant to sections 44.401-44.406, Florida Statutes, and a mediation participant may not disclose a mediation communication to a person other than a mediation participant or a participant's counsel.

If an agreement is reached, it shall be reduced to writing and becomes a binding and enforceable commitment of the parties. A resolution of one or more disputes in this fashion avoids the need to litigate these issues in court. The failure to reach an agreement, or the failure of a party to participate in the process, results in the mediator's declaring an impasse in the mediation, after which the aggrieved party may proceed to court on all outstanding, unsettled disputes.

The aggrieved party has selected and hereby lists three certified mediators who we believe to be neutral and qualified to mediate the dispute. You have the right to select any one of these mediators. The fact that one party may be familiar with one or more of the

listed mediators does not mean that the mediator cannot act as a neutral and impartial facilitator. Any mediator who cannot act in this capacity ethically must decline to accept engagement. The mediators that we suggest, and their current hourly rates, are as follows:

(List the names, addresses, telephone numbers, and hourly rates of the mediators. Other pertinent information about the background of the mediators may be included as an attachment.)

You may contact the offices of these mediators to confirm that the listed mediators will be neutral and will not show any favoritism toward either party. The names of certified mediators may be found through the office of the clerk of the circuit court for this circuit.

If you agree to participate in the presuit mediation process, the statute requires that each party is to pay one-half of the costs and fees involved in the presuit mediation process unless otherwise agreed by all parties. An average mediation may require 3 to 4 hours of the mediator's time, including some preparation time, and each party would need to pay one-half of the mediator's fees as well as his or her

own attorney's fees if he or she chooses to employ an attorney in connection with the mediation. However, use of an attorney is not required and is at the option of each party. The mediator may require the advance payment of some or all of the anticipated fees. The aggrieved party hereby agrees to pay or prepay one-half of the mediator's estimated fees and to forward this amount or such other reasonable advance deposits as the mediator may require for this purpose. Any funds deposited will be returned to you if these are in excess of your share of the fees incurred.

If you agree to participate in presuit mediation in order to attempt to resolve the dispute and thereby avoid further legal action, please sign below and clearly indicate which mediator is acceptable to you. We will then ask the mediator to schedule a mutually convenient time and place for the mediation conference to be held. The mediation conference must be held within 90 days after the date of this letter unless extended by mutual written agreement. In the event that you fail to respond within 20 days after the date of this letter, or if you fail to agree to at least one of the mediators that we have suggested and to pay or prepay to the mediator one-half of the costs involved, the aggrieved party will be authorized to

proceed with the filing of a lawsuit against you without further notice and may seek an award of attorney's fees or costs incurred in attempting to obtain mediation.

Should you wish, you may also elect to waive presuit mediation so that this matter may proceed directly to court.

Therefore, please give this matter your immediate attention. By law, your response must be mailed by certified mail, return receipt requested, with an additional copy being sent by regular first-class mail to the address shown on this offer.

_____

_____

RESPONDING PARTY: CHOOSE ONLY ONE OF THE TWO OPTIONS BELOW. YOUR SIGNATURE INDICATES YOUR AGREEMENT TO THAT CHOICE.

AGREEMENT TO MEDIATE

The undersigned hereby agrees to participate in presuit mediation and agrees to the following mediator or mediators as acceptable to mediate this dispute:

(List acceptable mediator or mediators.)

I/we further agree to pay or prepay one-half of the mediator's fees and to forward such advance deposits as the mediator may require for this purpose.

_____

Signature of responding party #1

_____

Signature of responding party #2 (if applicable)(if property is owned by more than one person, all owners must sign)

WAIVER OF MEDIATION

The undersigned hereby waives the right to participate in presuit mediation of the dispute listed above and agrees to allow the aggrieved party to proceed in court on such matters.

_____

Signature of responding party #1

_____

Signature of responding party #2 (if applicable) (if property is owned by more than one person, all owners must sign)

(b) Service of the statutory offer to participate in presuit mediation shall be effected by sending a letter in substantial conformity with the above form by certified mail, return receipt requested, with an additional copy being sent by regular first-class mail, to the address of the responding party as it last appears on the books and records of the association. The responding party shall have 20 days from the date of the mailing of the statutory offer to serve a response to the aggrieved party in writing. The response shall be served by certified mail, return receipt requested, with an additional copy being sent by regular first-class mail, to the address shown on the statutory offer. In the alternative, the responding party may waive mediation in writing. Notwithstanding the foregoing, once the parties have agreed on a mediator, the mediator may reschedule the mediation for a date and time mutually convenient to the parties. ~~The department shall conduct the proceedings through the use of department mediators or refer the disputes to private mediators who have been duly certified by the department as provided in paragraph (c).~~ The parties shall share the costs of presuit mediation equally, including the fee charged by the mediator, if any, unless the parties agree otherwise, and the mediator may require advance payment of its reasonable fees and costs. The failure of any party to

respond to a demand or response, to agree upon a mediator, to make payment of fees and costs within the time established by the mediator, or to appear for a scheduled mediation session shall operate as an impasse in the presuit mediation by such party, entitling the other party to proceed in court and to seek an award of the costs and fees associated with the mediation. Additionally, if any presuit mediation session cannot be scheduled and conducted within 90 days after the offer to participate in mediation was filed, an impasse shall be deemed to have occurred unless both parties agree to extend this deadline. ~~If a department mediator is used, the department may charge such fee as is necessary to pay expenses of the mediation, including, but not limited to, the salary and benefits of the mediator and any travel expenses incurred. The petitioner shall initially file with the department upon filing the disputes, a filing fee of $200, which shall be used to defray the costs of the mediation. At the conclusion of the mediation, the department shall charge to the parties, to be shared equally unless otherwise agreed by the parties, such further fees as are necessary to fully reimburse the department for all expenses incurred in the mediation.~~

(c) ~~(b)~~ If presuit mediation as described in paragraph (a) is not successful in resolving all issues between the parties, the parties may file the unresolved dispute in a court of competent jurisdiction or elect to enter into binding or nonbinding arbitration pursuant to the procedures set forth in s. 718.1255 and rules adopted by the division, with the

arbitration proceeding to be conducted by a department arbitrator or by a private arbitrator certified by the department. If all parties do not agree to arbitration proceedings following an unsuccessful presuit mediation, any party may file the dispute in court. A final order resulting from nonbinding arbitration is final and enforceable in the courts if a complaint for trial de novo is not filed in a court of competent jurisdiction within 30 days after entry of the order. As to any issue or dispute that is not resolved at presuit mediation, and as to any issue that is settled at presuit mediation but is thereafter subject to an action seeking enforcement of the mediation settlement, the prevailing party in any subsequent arbitration or litigation proceeding shall be entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process.

(d) ~~(c) The department shall develop a certification and training program for private mediators and private arbitrators which shall emphasize experience and expertise in the area of the operation of community associations.~~ A mediator or arbitrator shall be certified to conduct mediation or arbitration under this section ~~by the department~~ only if he or she has been certified as a circuit court civil mediator or arbitrator, respectively, pursuant to the requirements established ~~attended at least 20 hours of training in mediation or arbitration, as appropriate, and only if the applicant has mediated or arbitrated at least 10 disputes involving community associations within 5 years prior to the date of the~~

~~application, or has mediated or arbitrated 10 disputes in any area within 5 years prior to the date of application and has completed 20 hours of training in community association disputes. In order to be certified by the department, any mediator must also be certified~~ by the Florida Supreme Court. ~~The department may conduct the training and certification program within the department or may contract with an outside vendor to perform the training or certification. The expenses of operating the training and certification and training program shall be paid by the moneys and filing fees generated by the arbitration of recall and election disputes and by the mediation of those disputes referred to in this subsection and by the training fees.~~

(e) ~~(d)~~ The presuit mediation procedures provided by this subsection may be used by a Florida corporation responsible for the operation of a community in which the voting members are parcel owners or their representatives, in which membership in the corporation is not a mandatory condition of parcel ownership, or which is not authorized to impose an assessment that may become a lien on the parcel.

~~(3) The department shall develop an education program to assist homeowners, associations, board members, and managers in understanding and increasing awareness of the operation of homeowners' associations pursuant to this chapter and in understanding the use of alternative dispute resolution techniques in resolving disputes between parcel owners and associations or between owners. Such education program may~~

~~include the development of pamphlets and other written instructional guides, the holding of classes and meetings by department employees or outside vendors, as the department determines, and the creation and maintenance of a website containing instructional materials. The expenses of operating the education program shall be initially paid by the moneys and filing fees generated by the arbitration of recall and election disputes and by the mediation of those disputes referred to in this subsection.~~

Section 18. Except as otherwise expressly provided in this act, this act shall take effect July 1, 2006.